I N D E X

INDIVIDUAL MOTIONS TO DISMISS

Tuesday, 28 January 1947

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Court House of the Tribunal
War Ministry Building
Tokyo, Japan

The Tribunal met, pursuant to adjournment, at 0930.

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Appearances:

For the Tribunal, same as before with the exception of: HONORABLE JUSTICE NORTHCROFT, Member from New Zealand, not sitting.

LORD PATRICK, Member from the United Kingdom of Great Britain, now sitting.

For the Prosecution Section, same as before.

For the Defense Section, same as before.

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The Accused:

All present except OKAWA, Shumei, who is represented by his counsel.

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(English to Japanese and Japanese to English interpretation was made by the Language Section, IMTFE.)

MARSHAL OF THE COURT: The International Military Tribunal for the Far East is now resumed.

THE PRESIDENT: Mr. Smith.

MR. SMITH: If your Honor please, if it is appropriate I would like to suggest a couple of corrections in the record of yesterday's proceedings. The first correction is on page 16,267 of the record, the last three words in the second paragraph. The words "law in statute" should be stricken and in place of it should be "lower in stature."

The next, page 16,268 of the record, in the first sentence, the first sentence should be corrected to read, "A majority of the defendants in the box have joined in the present motion and it has been amplified."

THE PRESIDENT: Captain Brooks.

MR. BROOKS: Now comes KOISO, Kuniaki, by his counsel, and respectfully moves the Tribunal to dismiss each and every one of the Counts in the Indictment against said Defendant on the ground that the evidence offered by the prosecution is not sufficient to warrant a conviction of said Defendant.

Before stating the argument in support of this motion to dismiss, we submit our legal basis therefor, and state that to determine whether a crime has been committed, it must be established:

1. That an act was committed which was sufficient to constitute a crime objectively, i.e., having the objective elements of a crime.

2. That the accused had the intention or knowledge of committing said crime, subjectively, i.e., he must have committed the act with the knowledge of facts or subjective elements, that they would rightly constitute the said crime, and we submit that the prosecution has failed to prove that KOISO committed any act which constituted a crime objectively or that he had guilty knowledge that any act he committed was wrong, or that he committed any act with knowledge subjectively that it constituted a crime.

We submit it is necessary for the prosecution in order to establish crimes against peace to prove that planning and preparation of a war was carried out with subjective knowledge or intention to initiate or wage a war of aggression or a war in violation of international law, treaties, agreements or assurances, or a war must have been initiated and waged with the knowledge that the war was an aggressive war or a war in violation of international law, treaties, agreements or assurances.

A crime against peace can not be said to have been committed where ones actions were without the

foregoing knowledge and where the prosecution's evidence points to an emergency situation and to a prevailing international situation that caused the initiation of measures for self-defense; or where the accused came into a responsible position without the foregoing knowledge or intention and carried out the duties of his office as a patriotic citizen of his country in what he believed to be a war of self-defense.

All wars are not criminal, and the burden of proof is on the prosecution to show the accused had knowledge that the said war was one of aggression or in violation of international law, treaties, agreements or assurances, and that the accused did not rely on official statements that his government was exercising its exclusive, sovereign prerogative to institute and carry out measures on the basis of self-defense.

Since the causes of a war are complicated and divergent, it is difficult for any one other than the sovereign nation itself to analyze what action is a measure of self-defense and even the governing body of a country may be wrong in its judgment and decision and statement, due to omissions in its information or misinformation, or misunderstanding when coupled with the difficulty of understanding and analyzing the real situation prevailing inside an

opposing country, especially when the relations of countries are strained and the sentiment, passion and pride of the people is aroused.

Therefore, assuming it was clear after peace has been restored and abundant revealing information has been collected from the various countries concerned that in the light of difficult and profound theory of international law, treaties, agreements and assurances, a war has been waged that was illegal or aggressive, these facts alone do not establish that the officials of the country concerned were cognizant that said war was or would be considered illegal or aggressive. The prosecution must show by facts and evidence that at the outset and at the time thereof the accused had such guilty knowledge beyond a reasonble doubt which they have failed to do.

Since international law, treaties, agreements or assurances require highly technical knowledge in relation to the interpretation thereof, together with the circumstances enumerated above, it becomes impossible for an individual or the general public to form an independent judgment as to the legality of a war and they are compelled to listen and depend naturally upon government announcements and opinions of other men of authority and as in the case of an

interpretation of the reservation of the right for the use of self-defense mentioned in the Kellogg-Briand Pact since a clear and concise definition has not been reached by international agreement and proclamation, the exclusive determination and interpretation thereof is an individual sovereign right of each nation.

When we consider the above stated points, we readily understand why in the Nuernberg judgment they did not find guilty of crimes against peace any defendant who failed to attend those important conferences at which Hitler confidentially expressed his aggressive intention and only where the prosecution proved beyond a reasonable doubt that those in this small inner circle had guilty knowledge and intention to act, to carry out Hitler's aggressive war plans, did the Court impose penalty.

We submit that the finding of the Nuernberg trial in relation to the "General Staff and High Command" reaffirmed the principle that the simple fact that an accused occupied a certain important position at the time when a certain incident broke out does not establish that said accused is guilty of a crime against peace and a sharp distinction was made between this and a criminal organization such as the Nazi party of Germany. Here, the Cabinet, the Ministry

of War, other Ministries, the General Staff Office and the Kwantung Army Headquarters have not been shown by the prosecution to be criminal organizations, and the occupation of a position thereon does not establish the fact that the defendant was guilty of a crime against peace.

If the prosecution has established that a certain criminal act occurred in which several persons participated, we submit that only those members of said joint action can be held responsible for the crime who had guilty knowledge that said act was a crime, or whose official acts were carried out with knowledge and intention to aid and assist or conspire to commit said crime. Otherwise, we overthrow the principle of law that in the case where a nurse prepares medicine and administers it in accordance with a doctor's prescription in good faith, or in the case where the doctor who, without knowing the patients abnormal consititution, prescribed for him properly, neither nurse nor doctor can be charged with murder even though the patient dies as a result of taking the medicine.

Moreover, in the ordinary criminal offense, the actual relations or objective elements of the crime are not very complicated, and belong in principle

to illegal acts; therefore, those who brought about facts or objective elements which constitute the crime can generally be presumed to have had knowledge that their acts were criminal but this theory is only followed where the burden of proof rests with the defendant who contends his innocence.

In the case of a war the actual relations as previously stated are not only complicated and divergent but if there is a presumption it would be that a war is not illegal. Therefore, except in a special instance where a defendant is a member of an organization which has been declared by a court of justice to be criminal the burden of proof regarding amlicious intention or guilty knowledge is on the prosecution and has not been established by the evidence presented against the defendant KOISO.

Mere knowledge by a defendant that following a war or an act of hostility a change is brought about in the territorial sovereignty of a certain area does not establish that said war or act of hostility was one of aggression or was intended to be one of aggression. For example, during World War I, the Allied Powers occupied certain territories and countries, and, after the war, made a part of them either their own territory, or acquired same as mandated territory.

No one by reason thereof would accuse such countries of having or of having considered this change as being interpreted as being aggressive, or contemplated as such either during the waging of the war or thereafter.

We submit that simple declarations in newspapers, or marshalling of various policies alone are far from sufficient to establish that a plan for an aggressive war existed. The Nuernberg finding clearly stated this point:

"But in the opinion of the tribunal, the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal must not rest merely on the declaration of a party program, such as are found in the 25 points of the Nazi party, announced in 1920 or the political affirmation expressed in 'Mein Kampf' in later years. The tribunal must examine whether a concrete plan to wage war existed and determine the participants in that concrete plan."

We further submit, that to be a participant, guilty knowledge must be proven by the prosecution to have existed on the part of the accused and to have governed his actions.

In examining various counts under Group I, Crimes Against Peace, we find their constitution extemely complicated and hard to comprehend, and that no clear charge with sufficient connecting and supporting evidence has been established against the defendant

KOISO, and we submit that KOISO had no connection with the crimes charged, even if such a general and abstract conspiracy as charged by the prosecution existed. We further submit that such a charge by the prosecution under Count I cannot be said to constitute a crime against peace as set forth by Article 5 A of the Charger of the Tribunal in light of the Nuernberg decision above quoted. The prosecution has failed to show that KOISO conspired with the defendants or other divers persons. The prosecution's evidence (Court exhibit 1278) shows KOISO was not intimately known by other accused and members of the government, and was considered by the Army circle to belong to a neutral faction,and by government officials he was described as a just, moderate and moral character, possessed of a well-developed common sense. The prosecution has failed to show that KOISO was member of either the Minseito or Seiyukai political parties, or active in any other political group or factions. The prosecution's evidence establishes that the so-called March Incident and October Incident of 1931 were domestic political issues due to the corruption of domestic administration and aimed at internal reform, and that there was no relation between these incidents and any war or plan for war, as was testified to by witnesses SHIMIZU, Konosuke;

TOKUGAWA, Yoshichika; and UGAKI, Kazushige; during cross-examination on 26 June and 1 July 1946. (Court record pages 1404-1410, 1411, 1418, 1419, 1626 and 1627.)

This testimony clearly shows that the defendant KOISO was not a participant but that KOISO, by order of his superior, prevented the carrying out of the incident and caused the firecrackers to be used in the demonstration to be confiscated.

Court exhibit 179-C, an excerpt from KIDO's diary, we submit is not reliable as it was based on hearsay received by KIDO from HARADA after the incident occurred. Since HARADA was not a participant in the incident his information could only be based on rumors unfounded on facts, many of which were circulating in political circles. The above also explains why KOISO was kept at a respectful distance by extremist political factions. Furthermore, UGAKI, the War Minister in the Minseito Cabinet which was then in power, could not conceivably be expected to discuss a scheme for overthrowing the Cabinet with Mr. MORI, a leader of the Seiyukai, an opposition party. (Court record pages 1626-27.) Wherefore, defendant moves to dismiss Count I of the Indictment.

On the 18th of September 1931, the time of

the Manchurian Incident, the prosecution's evidence fails to prove that KOISO in any of the positions of government occupied (Court exhibit 114) was in a position of authority or responsibility, or was connected in any illegal or criminal activity or conspiracy, and it was therefore natural that in the opening statement pertaining to the Manchurian Incident read by Prosecutor Darsey, 1 July 1946, there was no specific mention of defendant KOISO.

The prosecution's evidence in this phase of the case presented by the witness SHIDEHARA, Kijuro, Minister of Foreign Affairs at the time of the Incident (Court record page 1385), and the testimony of WAKATSUKI, Reijiro, Prime Minister (Court record page 1571) discloses that the defendant MINAMI, Minister of War, supported SHIDEHARA's policy for localization of the incident and assisted in carrying out this policy. KOISO, Chief of Military Affairs Bureau under MINAMI (Court exhibit 162), also acting under War Minister MINAMI's orders, carried out his duties in conformity with the SHIDEHARA policy, and the prosecution's evidence does not show any illegal or criminal activity in KOISO's exercise of the functions and duties of his office.

Later, on the formation, in December 1931, of

the INUKAI Cabinet in place of the WAKATSUKI Cabinet, Premier INUKAI stuck to the policy of localizing the Manchurian Incident (Court exhibit 161, court record pages 1479-1480,) and Defendant ARAKI, War Minister, supporting the same policy (Court record page 1489) utilized Defendant KOISO, first in the capacity of Chief of Military Affairs Bureau as theretofore, and also later as Vice-Minister of War where KOISO's authority and responsibility was very limited. (Court record pages 14397, 14405 and 14406.)

On 8 August 1932 KOISO was appointed Chief of Staff of Kwantung Army under Field Marshal MUTO, Commander in Chief of Kwantung Army, where he executed his duties in conformity with the orders of the Commander in Chief, (Court record pages 2075-2076 and 2101-2102,) and in the belief that the administrative duties assigned to him were in conjunction with the subjugation of bandits, the maintenance and restoration of peace and order, and for the protection of Japanese and Korean residents and property rights under the Japanese Government's previous steps taken in the exercise of its sovereign right of self-defense, which was generally accepted on the basis of a report of investigation as testified to by witnesses SHIDEHARA, 25 June 1946, WAKATSUKI, 28 June 1946, and TANAKA, 8 July 1946.

We submit Defendant KOISO had no means or facilities of his own to inquire into the state of affairs, and was dependent on the announcements made by the Japanese Government, and the prosecution's evidence fails to establish that Defendant KOISO had guilty knowledge that said incident was or would be considered an aggressive act as alleged.

In connection with Court exhibit 230 it can be inferred from the introductory part of this document, entitled, "The Principles for Guiding Manchukuo," the Second Division of the Army General Staff drafted this in accordance with government policies decided by the Cabinet (Court exhibit 222,) then seeking the advice of the authorities on the spot as to the advisability and practicality of the principles to be used, the Second Division sent such rough drafts to the Staff office of the Kwantung Army for their comments. Said Staff officers in consultation with NAGATA, Chief of Second Division of Army General Staff then in Manchukuo, suggested revisions deemed necessary in view of local conditions, and when approved by the Commander in Chief, sent such draft back to the War Ministry. Therefore, we submit that KOISO's actions in this matter were not unlawful.

We further submit that any promotions received

by KOISO, as indicated in Court exhibit 114, were based on length of service and followed as a matter of course, and that certain technical transfers were made in order to place him on the reserve list, as, for example, his attachment to the General Staff on 18 July 1938, which was not meant to make him occupy any effective function as a member of the General Staff but made him eligible for retirement on the reserve list, which was, in fact, done two weeks later, and the prosecution's evidence does not supply any proof that any promotion or change in position was an award for or a part of any unlawful activity. Wherefore, defendant moves to dismiss Counts 2, 18 and 27 of the Indictment.

We submit that in relation to the China Incident that an examination of Court exhibit 114 will disclose that KOISO was not in any position where he could have taken any part in the movement for autonomy for the five North China Provinces (Court record page 2026) nor in the outbreak of the so-called China Incident resulting from the clash between Japanese and Chinese forces, 7 July 1937, at Marco Polo Bridge near Peking, KOISO was in Keijo, Korea, from 2 December 1935 until 15 July 1938 -- the brief shows 18; it should be 15. Although KOISO was Minister of Overseas Affairs in the

HIRANUMA Cabinet from 7 April to 30 August 1939 and in the YONAI Cabinet from 16 January to 22 July 1940, and Prime Minister from 22 July 1944 to 7 April 1945, there is no evidence connecting KOISO, or proving he participated, or had any responsibility for the military actions that occurred, or were being carried on during said periods of occupying said government posts. The KONOYE Cabinet having adopted a policy of not enlarging the said conflict, negotiated with the Chinese in the hope of coming to a solution, but failed and succeeding cabinets failed in their efforts.

The military action necessitated by the conflict was solely in the prerogative of the Chief of the General Staff, and the cabinet had no authority therein, as shown by the evidence of UGAKI (Court Record page 1620), by SHIDEHARA (Court Record page 1389-1392) and Court exhibit 179-L. Furthermore, the Japanese Government having publicly declared that the outbreak of the China Incident originated in self-defensive action taken to protect Japanese residents and property rights and against provocative Chinese acts resulting from anti-Japanese propaganda, it was natural that KOISO not having at his disposal any organization or means to personally investigate such matters, should give full credence to the declaration of the

government, and there is no evidence which indicates that the defendant was cognizant, that the Chinese Incident and the actions taken therein was or would be considered unlawful or illegal as alleged and the evidence does not show that he conspired or participated in any manner as charged or that his action in the exercise of his duties and responsibilities in any government position was unlawful or illegal, or done with guilty knowledge or malicious intent to conduct or assist in any unlawful act. Wherefore, defendant moves to dismiss Counts 3, 6 and 28.

Wolf & Yelden

We submit that in relation to the Anti-Comintern Pact of 1938, renewed in 1941, the Tri-Partite Pact of 1940, and the Cultural and Trade Agreements signed between Japan in 1938 and 1939, and the No Separate Peace Pact of 1941, the prosecution contends that these agreements signed by the military representative on behalf of their separate countries were concluded with the view of obtaining the ends of Count 5 in the Indictment, and preferred charges thereunder against all persons participating in the conclusion of said treaties and agreements. We submit that Court exhibits 480, 483, 37, 38, 39 and 589 indicate this could not be true in regard to the Anti-Comintern Pact and the Cultural and Trade Agreements. As to the other pact, treaties and agreements, in their conclusion, the will of the state was expressed by the signed instrument to preclude the extension of hostilities and the aim of the aforesaid pact was defensive and pacific as made clear by Court exhibits 43, 554, 553-page 3, and 558-page 1. The prosecution construes "Establishment of a Co-Prosperity Sphere" to mean or indicate "Invasion." This is erroneous. States lying in geographical propinquity are deeply affected by conditions of their neighbors, and the above phrase means that countries with common

interests should unite their efforts to cooperate and further their mutual prosperity taking into consideration the resources and needs of their respective people in a regional community, itself a component and cooperating part of the universal community, thus cooperating and contributing to the progress of culture, well-being, and understanding and taking advantage of the special abilities of each to contribute thereto. Court exhibits 529-page 1, 553-page 3, 557-page 1, 558-page 1 and 2 indicate that although misuse can be made of the term "Co-Prosperity," in a sense which it originally does not possess, it is improper and erroneous to give it such meaning.

"Concerning war criminals of Germany, who endeavored to drive Japan into a war with the U.S.S.R., the United States and Great Britain, the Nuernberg decision did not question the treaty of alliance between Germany and Japan but only stated, "Ribbentrop attended a conference in May 1941 with Hitler and Antonescue relating to Rumania's participation in the attack on the U.S.S.R. He also consulted with Rosenberg in preliminary planning for political exploitation of Soviet territories and in July, 1941, after the outbreak of war urged Japan to attack the Soviet Union."

This confirms the error of the prosecution's view. Moveover, defendant KOISO at the conclusion of the Anti-Comintern Pact, 1936, was residing in Keijo, Korea.--

THE PRESIDENT: Captain Brooks, we are not bound by Nuernberg's findings of fact which may turn on different evidence. That may prove to be in your favor as well, perhaps, as against you.

MR. BROOKS: Yes, sir.

As Minister of Overseas Affairs in the HIRANUMA cabinet in 1939 which was after Ribbentrop's approach to Japan in the early part of said year, cabinet opinion was divided as to concluding said alliance, and KOISO opposed it and a committee of those mostly concerned was set up to study this problem but they never reached a conclusion. (Court exhibit 504; Court record, page 6108). The cabinet fell 30 August 1939 as the result of the conclusion of the Non-Aggression Pact between Germany and U.S.S.R., 23 August 1939, KOISO resigned as Minister of Overseas Affairs (Court record, page 5859, Court exhibit 114), and took no part in the conclusion of the Japanese-German alliance. On 16 January 1940 KOISO joined the YONAI cabinet as Minister of Overseas Affairs, but in this cabinet, the Prime Minister, YONAI, Foreign

a conversation took place, and KOISO pointed out he had no authority to negotiate or responsibility in such diplomatic matters as proposed by Ott. The German Ambassador had many intimate friends in the Japanese Army, as made clear in Court exhibit 498, 504, 508, 511, and if the Japanese Army had wanted to sound German attitude concerning such an important military operation in French Indo-China or Netherlands East Indies, they would not have entrusted this to KOISO, as he was not on specially good terms with them, and was not even acquainted with Ott nor could they converse without an interpreter. And, furthermore, military operations were outside the scope of KOISO's jurisdiction.

The fact that KOISO was not of the KONOYE political faction, and the fact that he was not on especially intimate terms with the Army is pointed out in exhibit 1278, pages 9-10.

Furthermore, contrary to Ott's observation, KOISO withdrew from official life with the fall of the YONAI cabinet, and for two years retired as a private citizen engaged in agriculture (Court exhibit 114), and the KONOYE cabinet came in and KOISO being opposed to conclusion of the Tri-Partite Pact; had no expectations of holding cabinet positions therein.

Minister, ARITA, the defendant KOISO and others opposed the conclusion of the Tri-Partite Alliance during their tenure of office. Dissatisfaction on the part of the Army, concerning this opposition, caused the cabinet to fall 22 July 1940 and KOISO was obliged to resign (Court exhibits 515, 520, 530, 531 and 532, Court record, page 5865-5866).

Court exhibit 523, a telegram from Ott to Germany was offered during the Dutch East Indies phase and is inconsistent, for at said time, KOISO was Minister of Overseas Affairs in the YONAI cabinet, and was told by TOKUGAWA, Yoshitomo, that Ott desired to meet KOISO, although KOISO was not Minister of Foreign Affairs, there was great concern in Japanese Government circles as to the future of Netherlands East Indies and French Indo-China, since they were colonies of Netherlands and France, who had been recently defeated by Germany. (Court exhibits 517, 518, 519, 520, 525, 526, 527 and 528). And also because of the supervision of the South Seas Mandated Islands, former German colonies, it was feared conflict might arise between Japan and Germany in the future. Therefore, having obtained approval of Prime Minister YONAI and Foreign Minister ARITA, to meet Ott and sound out the attitude of Germany, unofficially,

a conversation took place, and KOISO pointed out he had no authority to negotiate or responsibility in such diplomatic matters as proposed by Ott. The German Ambassador had many intimate friends in the Japanese Army, as made clear in Court exhibit 498, 504, 508, 511, and if the Japanese Army had wanted to sound German attitude concerning such an important military operation in French Indo-China or Netherlands East Indies, they would not have entrusted this to KOISO, as he was not on specially good terms with them, and was not even acquainted with Ott nor could they converse without an interpreter. And, furthermore, military operations were outside the scope of KOISO's jurisdiction.

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Ott's reason for meeting KOISO who was opposed to the Tri-Partite Pact in the anti-alliance YONAI and ARITA cabinets is not clear and his telegram following said meetings may have been calculated only to impress his government with his efforts (Court record, page 5860, lines 4-16).

Furthermore, KOISO did not attend any of the Imperial or liaison conferences or cabinet meeting listed in Appendix E of the Indictment. Therefore, the evidence of the prosecution has not indicated that Counts 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 or 17 implicate defendant KOISO. Wherefore, we move their dismissal on behalf of KOISO.

We submit that the portion of Court exhibit 730 tendered by the Soviet prosecutor, dealing with the defendant KOISO is inconsistent with the fact that KOISO was Chief of Staff of the Kwantung Army from 8 August 1932 to 5 March 1934, and Minister of Overseas Affairs from 7 April to 30 August 1939, and since the witness was executed in Soviet Russia and the right to cross-examination was thereby prevented, the probative value and consideration of this document, under the circumstances, is dubious. Court exhibit 668 is contrary to fact and absurd in stating that KOISO issued Education Ministry instruction. This

witness was also executed and cross-examination prevented thereby. The incident between Japanese and Soviet troops in the Khalhin-gol River area occurred when KOISO was Minister of Overseas Affairs in the HIRANUMA cabinet. The evidence shows this to be a local incident over an undefined boundary line and was settled among Japan, Manchukuo, Mongolia and the Soviet Union, without the fighting spreading outside the area in question. Moreover, the movement of armed forces in areas outside Japan is under the jurisdiction of the Army General Staff and not under the jurisdiction of the cabinet, as is clear by the testimony of various witnesses (Court record, pages 1623, 1389, 1392, etc.).

We submit that when defendant KOISO occupied the post of Prime Minister during the Pacific War, 22 July 1944 to 7 April 1945, this war had already been initiated and was being waged by the TOJO cabinet, and on the fall of said cabinet, because this military situation could not be left to itself, on recommendation of senior statesmen, after investigation of KOISO's past record, KOISO was commanded by the Emperor to form a cabinet in cooperation with admiral YONAI, and to devote their efforts toward saving their country. (Court exhibit 1279).

These were the circumstances of KOISO's undertaking the Premiership, and it was not as a result of any request by the TOJO cabinet to take charge of the situation, and KOISO's activity and duties of said office were understood to follow the Imperial Rescript, issued on 8 December 1941 (Court exhibit 1240), proclaiming this to be a legitimate war of self-defense in the exercise of the exclusive sovereign rights to take defensive measures.

Therefore, KOISO, as a citizen of this country, and unrelated in any way with planning, preparing or initiating this war, had no alternative but to place reliance and trust on said declaration, and in doing so, had no knowledge that he was committing any unlawful act. The prosecution's evidence does not prove or indicate that KOISO had knowledge that this was an illegal war as alleged, and, we submit that KOISO cannot be regarded as having waged an illegal war merely on the ground that he assisted in conducting affairs of state as Prime Minister. KOISO, by reason of his office as Premier, in accordance with regulations previously passed, unavoidably became president of the I.R.A.A. which was originally a public organization for carrying out the ways of the subject, (Court exhibit 167, 168, Court record page 1643 and

1946) and it was not an organization such as the Nazi Party, and did not have any political platform advocating aggressive war; moreover, actual leadership was entrusted to the Vice-President, a minister without portfolio (Court record, page 637).

The Administrative Speech delivered in the Imperial Diet (Court exhibit 829) is what would be expected in the speech of any war time premier and it is clear that similar to a platform of a political party this cannot be taken to mean the waging of an illegal war--as discussed in the Nuernberg decision.

Wherefore defendant moves to dismiss the balance of counts in Group I, that is: Counts No. 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 26, 29, 30, 31, 32, 34 and 36.

We submit that in relation to the counts under Group II -- murder, and Group III -- conventional war crimes and crimes against humanity, the prosecution has failed to establish the proof in any way of the existence of facts as related to the accused KOISO as charged in counts thereof. Moreover, since the movement of armed forces outside of Japan come primarily under the jurisdiction of the Supreme Command, and are controlled exclusively by the Chiefs of the General Staff, the responsibility thereof has no connection

with any office held by KOISO during said time.

Furthermore, prisoners of war outside of Japan are the responsibility of the Commander in Chief of the Army in the field, where as the Commander in Chief of the respective place concerned is responsible for executing the policy for the treatment of prisoners of war in Japan proper. Anyone outside of the Army, even the Prime Minister, has no authority to intervene in these matters, and no responsibility in connection therewith. Moreover, the Prime Minister has no authority to punish or prevent illegal acts in the Army (Court record, page 575, 586, 588, 594, 595, 596, 597, 599, 600, 601, 1389, 1392, 1862, and Court exhibit 68, 70, 74, 75, 78, 79, 80 and 92).

Also, Court exhibit 114 makes clear that defendant KOISO never filled the post of Minister of War, Chief of the General Staff, or Commander in Chief of any front line armies, and was not in the service of the army after 29 July 1938.

Furthermore, protests by foreign countries concerning treatment of prisoners of war were as a matter of routine transferred by the Foreign Office to certain prisoner of war administration offices under the Ministry of War, where such matters were forwarded to the respective commander in the field

responsible for supervising and reporting as to prisoners of war and other internees. None of this information whatever thereanent was forwarded to the Prime Minister (Court exhibit 2170, 2174, Court record, last line--page 14286 and page 14287; also testimony of Tadakatsu SUZUKI in afternoon session of the Court, 17 January 1947).

Whereas, the accused KOISO, as stated above, does not fall under any of the crimes against peace in Group I, it would be quite clear that there is no basis for any charge in relation to the counts relating to crimes of murder in Group II, or conventional war crimes and crimes against humanity in Group III. Wherein, counsel moves to dismiss Counts 44, 48, 49, 50, 51, 53, 54 and 55.

The defendant KOISO voluntarily presented himself to the authorities for trial and thereafter pleaded not guilty at the time of arraignment and cooperated by way of interrogatory to place the truth before this Tribunal so that his actions might be judged in the light of the circumstances as set out above and his name be cleared of any implication that he was knowingly a participant in any dishonorable act or guilty of malicious or unlawful intentions in carrying out his obligations in behalf of his native

land and since the sands of time are running short in his life and because he has been deprived of liberty in Sugamo Prison more than a year, counsel confidently and most earnestly requests the Tribunal, and firmly believes that your Excellencies, Mr. President and Members of the Tribunal, all of whom have deep understanding concerning such matters, after solemn deliberation and reflection, setting aside the prejudices and passions aroused by the holocaust of war, will understand an discern the difference between loyal devotion to duty, however mistaken, as distinguished from guilty knowledge and malicious intention to commit evil, and for the reason that there has been a total failure on the part of the prosecution to offer any substantial evidence to support any of the counts of the Indictment against said defendant will enter an order dismissing the Indictment as against Mr. KOISO and summarily order his discharge from custody.

All of which is most respectfully submitted.

THE PRESIDENT: Mr. Mattice.

MR. MATTICE: May it please the Tribunal, omitting the caption and the signatures:

COMES NOW the accused MATSUI, Iwane, and moves this Tribunal to dismiss the Indictment herein as to him, for the reason and upon the ground that the evidence adduced by the prosecution is insufficient to justify a conviction.

Inasmuch as the accused MATSUI is not charged in all of the Counts of the Indictment this memorandum will be directed first to the various counts for the purposes of clarity.

1. The evidence is insufficient to connect the accused MATSUI with the charges contained in Counts 1, 2, 3, 4 and 5 to the effect that he with others participated in the formulation or execution of a plan, the object of which is as stated in each of the Counts. The evidence thus far adduced shows that the accused MATSUI was called out of retirement and appointed Commander of the Shanghai Expeditionary Forces on 15 August 1937 and that he was relieved of his post in February 1938. Nowhere else in all of the evidence adduced in this case does MATSUI appear. The military actions in China had commenced and had been under way for a long period of time before MATSUI was appointed

as aforesaid.

2. There is not sufficient evidence to warrant his conviction in charges 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, where he is charged with others as planning a war of aggression and a war in violation of International Law, treaties, agreements and assurances against countries named in those Counts.

3. He is not charged in Count 18.

4. In Count 19 he is charged with others in having initiated a war of aggression and in violation of International Law against China. The evidence adduced shows that the military actions in China had been commenced and had continued for a long period of time before MATSUI had any connection with it.

5. MATSUI is not charged in Counts 20, 21, 22 and 23, and in addition to what was stated in this motion it should be stated that he is also not charged in Count 24 and by reason thereof lines 1 and 2 of paragraph No. 6 should be deleted so that paragraph 6 will read as follows:

6. In Count 25 initiating war against Russia, and in Count 26 initiating war against Mongolian Peoples Republic. In Counts 27, 28, 29, 30, 31 and 32 with having waged war against the countries named in these Counts. It is submitted that there is no substantial

evidence to justify the conviction of the accused MATSUI on those specifications.

7. He is not charged in Count 33.

8. In Count 34 he is charged again with others with having waged war against Thailand. In Count 35 against Russia and in Count 36 against the Mongolian Peoples Republic and the Russians. To sustain these charges, as to the accused MATSUI, there is not sufficient evidence.

9. He is not charged in Counts 37, 38, 39, 40, 41, 42 and 43.

10. In Count 44 he is charged with others with participating in the formulation of a plan to procure and permit murder of Prisoners of War and civilians. It is submitted that there is no evidence to sustain these charges against the accused MATSUI.

11. In Count 45 he is charged with others in unlawfully ordering, causing and permitting an attack on the city of Nanking in breach of treaties, and to kill and murder thousands of civilians and disarmed soldiers of China. It is submitted that there is no evidence in the record establishing beyond a reasonable doubt that MATSUI either ordered, caused or permitted the attack on Nanking, or that he either ordered, caused, permitted or even had knowledge of

the killing of thousands of civilians and disarmed soldiers in China. The attack on Nanking by Japanese forces, was, of course, not an action which the accused MATSUI initiated, as is shown by the evidence. The attack was ordered by the Headquarters of the Japanese Army in Tokyo. As Commander of the Japanese Forces the accused simply carried out such orders. As will be more fully set out subsequently in this memorandum, there is no evidence to show that the accused MATSUI had any culpable part in any killing or murder of civilians or disarmed soldiers of China.

12. By reason of an error in the date this is in addition to what is taken in the motion. By reason of an error in the date named in line 3, paragraph 12 has been amended and the correction or amended paragraph 12 has been mimeographed and is being distributed --The Language Section has been furnished with the correction -- so that paragraph 12 will read as follows:

In Count 46 the same charge as in Count 45 is made against the accused MATSUI with respect to the City of Canton on 21 October 1938 and in Count 46 with respect to the City of Hankow, the date of which is 27 October 1938. As to the attack on these cities the evidence does not show that the accused MATSUI had anything whatever to do with those operations.

At the said time the accused MATSUI had resigned from his post as Commander of the Middle China Expeditionary Force and was living in retirement in Japan.

13. He is not charged in Counts 48, 49 and 50, but in Count 51, he is charged with others in having ordered, caused and permitted the attack on Mongolia, and Russia in the summer of 1939 and with having unlawfully killed and murdered members of the armed forces of Mongolia and Russia. This likewise was a military operation which occurred after the accused MATSUI retired from the armed forces of Japan and the evidence fails to show that he had any connection with it.

15. In Count 52 he is charged with others with having ordered, caused and permitted an attack on Russia and the killing and murder of members of the armed forces of Russia and for the same reason as stated in paragraph 14 above. The evidence is wholly insufficient to justify his conviction.

16. In Count 53, Group 3, "Conventional War Crimes" he is charged with others in having participated in the formulation of a plan to order, authorize and permit the Commander-in-Chief of several Japanese Naval and Military forces in each of several theaters

of war, and the officials of the Japanese War Ministry, and the persons in charge of each of the Prisoner of War Camps to commit breaches of the Laws and customs of war. It is submitted that there is no evidence to sustain the charge set out in this Count as to the accused MATSUI.

17. In Count 54 he is charged with others in having ordered, authorized and permitted the offenses of Count 53 and thereby violated the laws of war. There is no evidence to sustain this charge as to the accused MATSUI.

18. In Count 55 he is charged with others during the period 7 December 1941 to 2 September 1945 with disregarding their duty to take adequate steps to secure the observance of conventions and assurances and the Laws and Customs of War in the respects described in said Count and thereby violated the laws of war. It is submitted that there is no evidence to sustain this charge as to the accused MATSUI.

In connection with the post of Commander of the Shanghai Expeditionary Force held by the accused MATSUI from 15 August 1937 to 30 October 1937 and of the Middle China Expeditionary Force from 30 October 1937 to February 1938, it may be noted that so far as the evidence thus far adduced is concerned it shows that

the only theater in which action occurred in which his command participated was at Nanking. There is evidence that he was at his Headquarters at Soochow at the time of such attack. How distant from Nanking Soochow was does not appear from the evidence. There is evidence that the accused MATSUI went to Nanking on 17 December 1937. This was several days after the attack and taking of the City of Nanking. There is also evidence that after a few days in Nanking the Accused MATSUI returned to Shanghai.

Prosecution introduced in evidence exhibit 199, titled "Facts of Japanese Aggression in North China" in which Ching Teh-chun, formerly Deputy Commander of the 29th Army, stated that one Chen-Cho Shung had told him that DOHIHARA and MATSUI, Chief of the Japanese Special Service Board in Peiping that the Japanese made certain demands in respect to the building of a rail-road, and revision of the customs.

It was developed on cross-examination (record page 2376) that the MATSUI mentioned in exhibit No. 199 is not the accused.

Prosecution introduced in evidence exhibit 257, which was an excerpt from interrogation of the accused MATSUI. It should be noted on page 4 thereof the accused MATSUI directed that discipline be maintained

and the punishment of all evil-doers, and also directed a thorough investigation of the Nanking Incident and collaboration with foreign officials and diplomats and this was done. From this interrogation it also appears that the accused MATSUI was in Nanking only from 17 December to 24 December, that he met with United States and British Commanders and Admirals, also Italian and French Ambassadors, with view of settling matters in a peaceful manner. It also appears from this page of the interrogation that the accused MATSUI had never commanded troops before this time. On page 5 of this excerpt it appears that Division Commanders were responsible for whatever may have occurred at Nanking, and on page 6 it appears that there were court martial proceedings against an officer and some soldiers in regard to charges of rape of Chinese in Nanking, that the officer was executed and the soldiers imprisoned.

Prosecution introduced in evidence exhibit 552, titled "Conclusion of Pact between Japan-Germany-Italy".

Prosecution introduced in evidence exhibit 650, "Minutes on Privy Council Meeting", in regard to Protocol between Japan and France. Also introduced exhibit 660 titled "Investigation Committee of Privy Council on the Treaty between Japan and France", regarding residence, navigation, tariffs and trade.

In each of these exhibits the name of one of the Councilors was MATSUI. Attention is called to the fact that there was no evidence identifying the accused MATSUI as the individual mentioned in exhibits 552, 650 and 660, and it is not believed that the prosecution will claim that the MATSUI mentioned in those exhibits is the accused.

THE PRESIDENT: In paragraph 15 you refer to paragraph 14.

MR. MATTICE: Paragraph 15?

THE PRESIDENT: It is pointed out to me there is no paragraph 14. Do you mean 13?

MR. MATTICE: I see. No 14 seems to be -- there seems to be no No. 14; so the numbers, of course --

THE PRESIDENT: You alone know, Mr. Mattice.

MR. MATTICE: It should be rearranged.

THE PRESIDENT: Should that be 13?

MR. MATTICE: No, they seem to follow in sequence. No. 14 is missing between 13 and 15, which here appears. So, of course, the paragraph to which your Honor refers, which is No. 15, would really become No. 14.

THE PRESIDENT: Well, read paragraph 15 of your motion, your reasons for it.

MR. MATTICE: Yes, your Honor is quite right. It should refer to 13.

THE PRESIDENT: Captain Brooks.

MR. BROOKS: Now comes MINAMI, Jiro, by his counsel, and respectfully moves the Tribunal to dismiss each and every one of the counts in the Indictment against said defendant on the ground

that the evidence offered by the prosecution is not sufficient to warrant a conviction of said defendant.

The evidence adduced utterly fails to establish that the accused, MINAMI, Jiro, is guilty as a matter of law of any one of the counts alleged in the Indictment. In order to facilitate the Tribunal's consideration of these special aspects not considered in the general motion in behalf of all defendants, the defendant desires to present this memorandum brief which he respectfully submits is clearly in support of his contentions.

We find in Count 1:

That all the defendants are charged with participation in the formation or execution of conspiracy to make Japan secure the military, naval, political and economic domination of East Asia of the Pacific and Indian Oceans, and to make her wage declared or undeclared war or wars of aggression and war or wars in violation of international law, treaties, agreements and assurances.

Section 1 of Appendix A states:

"From January 1, 1928, onwards there was plot in the Japanese Army, and particularly in the Kwantung Army, supported by certain civilians, to create an incident in Manchuria, which should form

a pretext for Japan to conquer, occupy and exploit that country as the first step in a scheme of domination which later extended to other parts of China, to the territory of the Union of Soviet Socialist Republics, and ultimately to a wider field, aiming to make Japan a dominant power in the world."

That such a plot ever existed was denied by all the witnesses produced to this Tribunal by the prosecution (e. g., WAKASUKI's testimony, C. R. p. 1591). Even the notorious TANAKA Memorial was proved by the prosecution's own evidence to be a fake (see MORISHIMA's testimony, C. R. p. 3098). Grnating for argument's sake; that such a plot had existed somewhere in Japan or in Manchuria, the prosecution failed to connect the defendant MINAMI with it as a leader, organizer, instigator or accomplice thereof. Furthermore, if the so-called October Incident was the plot, then the defendant MINAMI was the one who successfully nipped it in the bud, as ex-Premier WAKATSUKI, testified that in the middle of October, 1931, MINAMI, as War Minister in his Cabinet, arrested the group of hot-blooded young officers involved in said plan, which was to start with the assassination of WAKATSUKI (C. R. pp. 1567-8).

Furthermore, Ryukichi TANAKA also testified: "However, on 12 September a cable was received by the Foreign Minister SHIDEHARA from the Japanese Consul General in Mukden reporting the fact that a company commander of a patrol unit in Fushun had said that within a week a big incident would break out. Foreign Minister SHIDEHARA brought this matter to the attention of the War Minister MINAMI and strongly protested against the report that he had on hand. As a result, the War Minister MINAMI ordered General TATEKAWA to go to Mukden as a special emissary post haste to put a stop to any contemplated action of the Kwantung Army and, in accordance with that order, General TATEKAWA made a hasty trip to Mukden." (C. R. p. 2006).

TANAKA further testified that General TATEKAWA told him that General MINAMI, War Minister, had instructed TATEKAWA to stop any such incident at all costs (C. R. p. 2006).

Furthermore, SHIDEHARA, the Foreign Minister above mentioned, testified that General MINAMI, far from opposing SHIDEHARA, was in complete agreement with his views (Court record, page 1385). Baron WAKATSUKI, the Prime Minister at that time, also testified that MINAMI was opposed to the spreading of the warfare in Manchuria (Court record, page 1571) and that MINAMI at Cabinet meetings never raised any objection to policies decided by the Cabinet. (Court record, page 1583.)

Furthermore, Mr. Hammock, 17th June, 1946, stated in opening, that they would prove the Cabinet of Baron WAKATSUKI, Premier from April 1931 to December 1931, was forced to resign by reason of the actions of the Defendant MINAMI, who was then War Minister. WAKATSUKI however, testified that the collapse of his Cabinet was caused not by any action on the part of War Minister MINAMI, but by the actions of the Home Minister ADACHI. (Court record, page 1580.) Baron SHIDEHARA also testified that the WAKATSUKI Cabinet was not forced to resign because of any action of General MINAMI (Court Record, page 13765. SHIDEHARA further testified that in spite of all the preventive measures taken by General MINAMI, the Incident continued to develop and to expand.

(Court Record, page 1389.)

Furthermore, the prosecution's evidence shows MINAMI also resigned in December 1931, and for a full three years was nearly forgotten by the public in an insignificant position in an office which had no special duty assigned to it but to attend a meeting or lectures once or twice a year.

Furthermore it was after his resignation that the Manchurian Incident reached its height and the Empire of Manchukuo was created. Would he have been in such a disfavored position during this time if he was a participant of any plan for the formation of that Empire?

Furthermore, Court exhibit 286, presented by the prosecution, a telegram from Foreign Minister SHIDEHARA to Consul General KUWASHIMA in Tientsin under the date of November 1st, 1931, shows General MINAMI, and the central military authorities were opposed to the independence of Manchuria, and to the restoration of the former Emperor Hsuan Tung, i.e., Pu-Yi. Court exhibit No. 299 a telegraphic instruction of General MINAMI to General HONJO, Commander of the Kwantung Army, warns the latter not to meddle with a new regime movement in Manchuria. Is it not

obvious that because he tried to enforce the Cabinet's policy to such an extent was the reason he had to resign with the WAKATSUKI Cabinet because they met with the dissatisfaction of public opinion?

Referring again to the Indictment Appendix A states: "About 3rd January, 1932, the Japanese forces occupied Chinchow in spite of assurance given by their Foreign Office to the United States on 24th November 1931 that they would not do so."

In regard to this matter we refer to Court exhibit No. 190, wherein the U.S. Ambassador Forbes in Tokyo sent a telegram on said date to the Department of State, informing that the Japanese Prime Minister, War Minister, Foreign Minister and the Chief of General Staff were all in full accord that hostile operations should not be extended to Chinchow, and that orders had been issued to that effect.

Furthermore, the Lytton Report, introduced by the prosecution, sets out on page 77 that the Japanese Army withdrew from the neighborhood of Chinchow to Shinmin, to the great surprise of the Chinese side, on 28th November. These facts clearly show that, while General MINAMI was in office, i.e., up to the 10th December, 1931), that said assurance given to Ambassador Forbes was faithfully observed.

Furthermore, the prosecution's own evidence shows that the power of the War Minister in the Japanese Government was very much limited compared with that of other countries, and that in Japan, matters concerning military operation, and of expeditionary forces came under the jurisdiction of the Chief of General Staff who had direct access to the throne in such matters. Mr. Horwitz, in his opening statement, June 14, 1946, discussed these matters as follows:

"According to the Constitution, the Emperor has the following powers with respect to the armed services:
Article XI. The Emperor has the supreme command of the Army and Navy.
Article XII. The Emperor determines the organization and peace standing of the Army.

Based on these two articles, the Imperial prerogative over military affairs has in practice been divided into the prerogative over the supreme command and the prerogative over the administration of the armed forces. The former covers the power of using the armed forces for the protection of the State from attack from both without and within, and the powers directly relating to military operations. The latter includes the organization of divisions and of fleets,

and all matters relating to military districts and sub-districts, to the storing up and distribution of arms, to education, inspections, discipline, modes of salute, uniforms, guards, fortifications, naval defenses, preparation for expeditions and fixing the annual number of recruits. This division has been constantly maintained since the cabinet system was started in 1885. In the exercise of the former power, that of the supreme command, the Emperor does not exercise it through the cabinet...." (C.R. p.p. 667-669).

Thereafter, Mr. Horwitz states that such power of supreme command was exercised through the Minister of War, the Minister of Navy, the Chiefs of the General Staff and the Chief Aide-de-camp to the Emperor (C.R. P. 669). This is in contradiction to the previous statement and is a mistaken interpretation of the distinct separation of the two powers, i.e., the power of supreme command and the power of military administration. The prosecution's evidence if studied will show who should be responsible for the former and who for the latter, and that the former was exercised through the chief of the General Staff, and the latter through Ministers of War and Navy. In other words, the Minister of War

was not responsible for matters of supreme command, but dealt with administrative personnel and budget problems as a member of the Cabinet. Reference to Court exhibit No. 188-B, ARAKI's interrogations, as offered by the prosecution, states: "After a policy has been decided by the Government, orders for operations would be issued by the Chief of General Staff. The War Minister has no right to issue orders in connection with operations." (C.R. p. 2220).

Furthermore, General UGAKI, called as a witness on behalf of the prosecution, testified: "The military movements and actions overseas come under the command of the Chief of Staff." (C.R. p. 1620). Furthermore, Baron WAKATSUKI testified to the same effect. (C.R. p. 1584).

Furthermore, Brigadier Nolan, in his statement, June 13th, 1946, quoted Prince ITO's interpretation of the Japanese Constitution as follows:

"The exercise of the right of warfare in the field - as the exigency of circumstances may require, may be entrusted to the commanding officer of the place, who is allowed to take such actual steps as his discretion dictates, and then report to the government. This is to be regarded as a delegation of sovereign power to a general in command of an army

in order to meet the stress of emergencies." (C.R. p. 586).

Therefore, the prosecution's evidence shows that the War Minister had no power or right to order the commanding officer of the field to obey his desire. All he could do as a Cabinet Minister was to advise and negotiate through the Chief of General Staff and make his advice or requests known indirectly to the army on the spot. In view of this restriction on the power of the War Minister and in consideration of what he had actually done to make known the policy of the Cabinet, we must admit that MINAMI excelled any of his predecessors or successors in an effort to control out-post garrisons at such a time of intermingling crisis and emergency.

THE PRESIDENT: We will recess for fifteen minutes.

(Whereupon, at 1045, a recess was taken until 1100, after which the proceedings were resumed, as follows):

Duda & Eder

THE MARSHAL OF THE COURT: The International Military Tribunal for the Far East is now resumed.

THE PRESIDENT: Captain Brooks.

MR. BROOKS: Resuming reading, if the Tribunal please, in the center of page 6:

The prosecution presented as evidence (court exhibit No. 186) an excerpt from an article in the Japan Times dated August 6, 1931, "to prove that MINAMI was in sympathy with the ultimate objective of the army in Manchuria." (Court record page 2205.) Mr. Hyder read this excerpt as follows:

"Some other observers, without studying the conditions of neighboring foreign countries, hastily advocate limitation of armaments and engage in propaganda unfavorable for the nation and the army." (Court record page 2209.) "Manchuria and Mongolia are very closely related to our country from the viewpoint of our national defense as well as of politics and economics. It is to be regretted that the recent situation in that part of China is following a trend unfavorable to our empire. The recent ascendency of anti-foreign agitation and new economic power in China, are responsible for such a tendency, which is a phenomenon of permanent duration instead of being a passing one.

In view of such a situation, I hope you will execute your duty in educating and training the troops with enthusiasm and sincerity, so that you may serve the cause of His Majesty to perfection." (Court record pages 2209, 2210.)

What is wrong with this speech? It was delivered at an anniversary meeting of division commanders. Is it, as was called by Mr. Hyder,"the dissemination of expansionist propaganda to the divisional officers by the accused General MINAMI"? (Court record page 2193.) Is it not customary for a war minister to instruct the officers to educate and train their troops with enthusiasm and sincerity? Is it not customary for a war minister to admonish hasty propagandists for armament limitation who do not take into consideration the conditions of neighboring countries and was it not proper to point out the seriousness of the Manchurian question from the viewpoint of national defense? Was MINAMI's speech any different than the commonplace, ordinary and matter-of-fact speech that would have been made by ary minister of war on such an occasion and under like circumstances? We contend that the prosecution's evidence does not show sympathy with the army in Manchuria nor any dissemination of expansion-

ist propaganda.

Furthermore, the defendant MINAMI, after three years' silence as hereinbefore mentioned, was thereinafter appointed Commander of the Kwantung Army and concurrently Ambassador to Manchukuo December 1934. What made him come back to such a post with which he had such painful experiences three years before? The answer may be found in the testimony of Ryukichi TANAKA:

"I think General MINAMI was appointed because of his very amiable character and his administrative ability. By speaking of General MINAMI's administrative ability, I am referring to the fact that there was a big job to be done, since Manchuria at that time was a hotbed of many disputes, especially between the police and the military police, and because banditry was still widespread, and his job was to restore peace and order, (correction by Monitor: because it was right after the time when there was an open clash between civil police and military police, and also because of guerrillas and bandits the situation was in chaos)." (Court record page 2140.)

In studying this matter, the attention of the Tribunal is called to the evidence that, when

MINAMI served as war minister in 1931, he served in the Cabinet formed by the MINSEITO Party, one of the two great political parties at that time; and that after the fall of the cabinet and simultaneous resignation of MINAMI in December of that year, the SEIYUKAI Party took power lasting until May 1932. On the assassination of the Premier INUKAI, a new cabinet was formed under Admiral SAITO, who was a non-partisan man. This super-party cabinet was succeeded by Admiral OKADA in July 1934, who was also disconnected with any party. Court exhibit No. 175 is cited, in which Admiral OKADA stated:

"The SAITO Cabinet which came into office in May of 1932, in which, as previously stated, I was Minister of the Navy, and my cabinet, which came into office in July of 1934, were known in government and army circles as 'Navy Cabinet.' The army resented both of these cabinets, because it recognized in them navy influence in opposition to the army policy of the use of force in connection with the expansion of Japanese influence in Asia." (Court record pages 1823, 1824.)

During cross-examination, OKADA testified that the administrative policy of his cabinet was the control or supervision of the military, the

economy of expenditures, and relief to the farming population. (Court record page 1886.) Was it then a mere coincidence that MINAMI, who had once tried to keep the military within bounds, was again chosen by the OKADA Cabinet to continue and accomplish the difficult task, on the spot?

Furthermore, Ryukichi TANAKA testified that immediately after General MINAMI's arrival to take over the post of Commander-in-Chief, he abolished the special service department in order to remove the evils of the practice of meddling in politics, inasmuch as he felt that it would lead to the corruption of the army itself. TANAKA stated also that MINAMI took the first decisive step toward the abolition of extraterritoriality in Manchuria and the transfer of the administrative rights of the South Manchurian Railway Zone. (Court record page 2118.) TANAKA emphatically denied that he had any recollection whatsoever of having ever testified to Prosecutor Sackett that General MINAMI was an instigator of aggressive action. (Court record page 2140.)

Mr. Darcey in his opening statement July 1, 1946, said he would prove that General MINAMI, Commander-in-Chief of the Kwantung Army, General

UMEZU, Commander-in-Chief of the Tientsin Army, and Colonel DOHIHARA cooperated in an effort to establish an autonomous area in the provinces of North China for the purpose of extending and strengthening the military, political, and economic domination of Japan in China.

In reference to this, court exhibit No. 211, an official document of the Chinese government, is cited:

"The Kuomintang Government despatched its War Minister, General Ho Ying-Chin to the north. As a result of his conference with General Sung Cheh-Yuan and General Han Fu-Chu, the Hopei-Chahar Political Council was established as an organ to manage the administration of North China. General Sung Cheh-Yuan was appointed as its chairman and assumed the office on December 18, 1935. This institution, while being under the supervision of the Kuomintang Government, is a new political organ which has in its hand the power to negotiate with Japan and Manchukuo for the maintenance of amiable relations with them." (Court record page 2704.)

On cross-examination, Chinese General Ching Teh-Chun replied that probably there was such a fact that General Sung Cheh-Yuan very greatly welcomed

the establishment of the Hopei-Chahar Political Council and that he had given voice to the principle of respecting the will of the people and the maintenance of harmony between Japan and China. (Court record page 2367, 2368.) He admitted also that the complex interests possessed by Japan in North China far exceeded those of other nations there (court record page 2473), and that on 10 June 1935, Generalissimo Chiang Kai-Shek issued an executive order for amicable relations between two neighboring countries, namely, between China and Japan. (Court record page 2480.) "The purpose of this order," Ching Teh-Chun explained, "was to admonish the people as a whole, as well as the Chinese army, to respect and be friends with neighbor countries." (Court record page 2480.)

From this evidence, it is clearly indicated that unprecedented relations of friendship existed between China and Japan in 1935 and 1936, the period in which the defendant MINAMI was the Chief of the Kwantung Army. It must be pointed out, moreover, that, according to court exhibit No. 215 (item 5 of the gist of plans in the instruction to the commander of the stationary troops in China from the General Staff in Tokyo under date of 13 January 1936), the

management of matters concerning North China was definitely assigned to the duty of the Commander of the Japanese stationary troops in China and did not belong to the jurisdiction of the Commander of the Kwantung Army. In line with this, Ryukichi TANAKA testified that he had seen the instruction of December 31, 1935, from the central authorities to the Chief of Staff of the Kwantung Army, to transfer General DOHIHARA from the Kwantung Army to the North China Army. The reason for such transfer, according to witness TANAKA, was that Major-General TADA, head of the North China garrison forces, protested to the coming of DOHIHARA, unless DOHIHARA was put under TADA's command. (Court record pages 2125, 2126.) It is, therefore, obvious that MINAMI's authority as Commander of the Kwantung Army did not extend to North China. Furthermore, he resigned from said office of commander and was retired from the active list in March 1936.

As to Section 2 (Military Aggression in the Rest of China) of appendix A, there is no need to mention the disconnection of MINAMI, as he was only a civil governor in Korea at the period of the so-called China Incident.

As to Section 3 (Economic Aggression in

China and Greater East Asia), it is maintained by the prosecution: "During the period covered by this Indictment, Japan established a general superiority of rights in favor of her own nationals, which effectively created monopolies in commercial, industrial and financial enterprises, first in Manchuria and later in other parts of China, etc."

In reference to this, it has already been pointed out above that MINAMI was the one who took the first step for abolition of Japanese special rights and interests in Manchuria, and said allegation of the prosecution, in this section, in relation to MINAMI, is not borne out by their evidence.

There was not the slightest evidence connecting MINAMI with the charges set forth in the remaining section.

Section 4 (Methods of Corruption and Coercion in China and Other Occupied Territories, in particular, secret transaction in opium and other narcotics). Section 5 (General Preparation for War), Section 6 (The Organization of Japanese Politics and Public Opinion for War), Section 7 (Collaboration between Japan, Germany and Italy, Aggression against French Indo-China and Thailand), Section 8 (Aggression against the Soviet Union), Section 9 (Japan, the

United States of America, the Commonwealth of the Philippines and the British Commonwealth of Nations), and Section 10 (Japan, the Kingdom of the Netherlands and the Republic of Portugal).

The prosecution's evidence shows that MINAMI did not take part in any of the Imperial conferences or liaison conferences of 1941 but that MINAMI was Governor of Korea from August 1936 to May 1942, when he was appointed a member of the Privy Council. The fact that the Privy Council was simply and purely an advisory board without any executive power was made clear to the Tribunal, in the prosecution's evidence on the departments of the Japanese government. The appointment of the defendant MINAMI was due to his resignation from the governorship of Korea on account of being deaf. MINAMI never spoke at meetings of the Privy Council, because of the difficulty in hearing, except on one occasion in 1943 when the Great East Asia Ministry was proposed to be set up, and then his only remark was that he was opposed to the proposition.

Finally in March 1945, when Japan was on the verge of collapse under the burden of a titanic war, MINAMI despite his age and infirmity was requested to take the chair of a society called the

Political Association of Great Japan, where he exerted his last effort to control the military and save the country from ruin. The prosecution never mentioned this political party, except in his life record attached to the Indictment. It must not be overlooked, however, that this society was entirely different from the Imperial Rules Assistance Association and that under his leadership or perhaps because of his leadership, the Japanese people, as distinguished from the government, accepted the Potsdam Declaration in such a calm and peaceful manner without great internal dissention.

THE PRESIDENT: We are assuming that these motions are based on the evidence that we already have and not on evidence that you propose to give. One gets the impression, perhaps wrongly, that you are at times projecting yourself into evidence to be given by the defense later. However, proceed.

MR. BROOKS: If the Court please, I think that a check on the references given will bear out the points I have in mind, although in one or two instances we have more or less previewed what we thought was coming in, and if it does not have probative value the Court can of course disregard it.

While we are digressing, if the Court

please, I might also point out that in relation to the opium problem that was brought out you will recall the testimony of witness TANAKA that MINAMI was responsible for the change in that.

Count 2 of the Indictment refers to a conspiracy to wage war against the Republic of China for the purpose of securing for Japan the military, naval, political and economic domination of the provinces of Liaoning, Kirin, Heilungkiang and Jehol, either directly or by establishing a separate state under the control of Japan.

As already set out herein, all the evidence produced by the prosecution establishes that MINAMI during the time he was War Minister, supported the cabinet policy to localize the conflict and prevent its expansion, but under the circumstances, it was humanly impossible for him to succeed in this task. As Baron WAKATSUKI testified, it was a sad truth that the Manchurian Incident continued to spread in spite of the unanimous efforts of his cabinet. (Court Record page 1575.) The fact that MINAMI was opposed to the establishment of a new regime in Manchuria has also been clearly indicated heretofore by the prosecution's evidence. Thus he incurred the disfavor of the public and kept an obscure post for three full years. Had he participated in the Manchurian Incident or fostered the establishment of Manchukuo, he would have been acclaimed by the jingoists, and also have received a title of baron, at least, as was bestowed by the

Emperor in the case of General HONJO.

When MINAMI was appointed in 1934 as Commander of the Kwantung Army and concurrently Ambassador to Manchukuo under the circumstances of which we discussed above, the independence of Manchukuo had already been recognized by Japan, by the Pope, the Republic of Salvador and the Republic of Dominica, and the Kwantung Army was stationed in Manchukuo by virtue of the Japan-Manchukuo Treaty of September 15, 1932. He was the third ambassador to the court of Manchu, after Marshal MUTO and General HISHIKARI. Soviet Russia sent her consuls to Manchukuo, concluded agreements for the sale of railways, and settled waterway and border questions. Even the Republic of China made various agreements with Manchukuo, such as postal, telegraphic, traffic and customs affairs. Never were the relations between China and Japan better than at that time, exchanging declarations of amity and promoting their legations to the status of embassies. Ryukichi TANAKA testified that the policy of the Japanese Government toward Manchukuo had been fixed when MINAMI went to Manchuria, and that it could not have been changed or modified by MINAMI's single authority. (Court Record pages 2114-5)

In this connection, TANAKA stated:

"The Kwantung Army exercised the authority of inner guidance over Manchukuo by virtue of the Japan-Manchukuo Treaty. This treaty being concluded by the Japanese Government, it goes without saying that this authority was conferred upon the Kwantung Army by the Japanese Government." (Court Record page 2174)

TANAKA also stated:

"There is a very great difference between interference and inner guidance. It is natural not to interfere. But as to pulling the strings, as it were, that is a separate question." (Court Record pages 2115-6)

Even by the interpretation of a hostile witness, the inner guidance or the pulling of strings by Japan does not mean interference with the independent status of Manchukuo. In fact, there are many countries in the present world which are perfectly independent but placed under some sort of guidance by foreign states. For instance, we do not doubt the independence of the Republic of China, in spite of our common presumption that the United States and U.S.S.R. are both pulling strings in regard to her inner politics. When the defendant MINAMI took the new post in Manchukuo, he believed that it was an

independent country in law and in fact, and that it was his duty as per the command of the Emperor to protect Japanese life and property rights therein. In the testimony of Ryukichi TANAKA, we can see a glimpse of MINAMI's attitude toward Manchukuo, and, incidentally, toward Mongolia. TANAKA testified that the treaty of July 1935 between Manchukuo and the Inner Mongolian Autonomous Government was concluded between the two parties on an equal footing, not by the demands of the Kwantung Army, but by the earnest desire on the part of Prince Teh himself. (Court Record page 2042)

TANAKA testified also that MINAMI flatly refused TANAKA's request in 1944 to strengthen the said autonomous government by establishing a Mongolian Society. (Court Record pages 2143-4.) Why did MINAMI decline to become the president of a society for the promotion of the independence of Inner Mongolia? The evidence does not show he was conspiring to create a separate state or states under the control of Japan, as alleged in Counts 2 and 3 of the Indictment, but it does show that MINAMI was neither an empire-builder nor a state-maker.

Count 3 has been generally covered in the above discourse. During MINAMI's tenure of office

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"I have no recollection whatsoever of having ever testified to Prosecutor Sackett that General MINAMI was an instigator of aggressive action." (Court Record page 2140)

We shall not be able to understand these words of the witness, unless we call the charge false which alleges MINAMI a conspirator to wage war against the Republic of China for the purpose of dominating her either directly or by establishing a separate state or states under control of Japan.

In Count 4, the prosecution charges a conspiracy to wage war against the United States of America, the British Commonwealth of Nations, the Republic of France, the Kingdom of the Netherlands, the Republic of China, the Republic of Portugal, the Kingdom of Thailand, the Commonwealth of the Philippines, and the U.S.S.R. for the purpose of dominating East Asia and the Pacific and Indian Oceans.

The prosecution's evidence does not connect MINAMI with this formidable charge. Their evidence shows that when the Pacific war was started, MINAMI was the Governor of Korea and had been a resident in Seoul since August 1936. The evidence does not show that he was summoned to Tokyo to be present at any of the Imperial or liaison conferences of the

government or of general headquarters to discuss the pros and cons of the war, nor even that he had any information that such a war was contemplated in Tokyo.

In Count 5, the prosecution charges a conspiracy to wage war against the whole world by mutual assistance of Germany, Italy and Japan, for the purpose of securing for each of the three countries special domination in its own sphere. The prosecution's evidence does not show that MINAMI had hand in this matter. When the Anti-Comintern Pact was signed in November 1937, and when the Tripartite Pact was concluded in September 1940, MINAMI was Governor General of Korea, and did not return to Tokyo until May 1942, some time after the outbreak of the war. It should be mentioned in passing that the governmental charts show the Governor of Korea is a civilian official under the jurisdiction of the Ministry of Colonies. (Court Exhibit No. 87)

In relation to Count 6, as already stated above the prosecution has failed to show by the evidence that MINAMI ever planned or prepared a war against the Republic of China, but their evidence does show that he was strongly opposed to any measure or action that might lead to such a war, and was never in a position where he could be said to be responsible for

any action causing such war.

In relation to Counts 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, the prosecution has failed to show that MINAMI had any position of responsibility or any connection with the wars against the various allied nations therein set out, as an instigator or conspirator or any other capacity or took any part in formulating or advising on the war plans in relation thereto.

While Count 18 mentions specifically the name of the defendant MINAMI as one who, on or about 18 September 1931, initiated a war of aggression and a war in violation of international law, treaties, agreements and assurances against the Republic of China, this allegation has already been refuted at length by the prosecution's own witnesses and evidence. The same is true of Count 27 (which charges him for actually waging a war against China between the 18th of September, 1931, and the 2d of September, 1945) and of Count 28 (which charges waging war against China between the 7th of July, 1937, and the 2d of September, 1945), Count 29 (against the United States of America between the 7th of December, 1941, and the 2d of September, 1945), Count 30 (against the Philippines), Count 31 (against the British Commonwealth), Count 32

(against the Netherlands), and of Count 34 (against Thailand).

Coming to Count 44 which charges a conspiracy to procure and permit murder on a wholesale scale of prisoners of war, members of the armed forces of countries opposed to Japan who might lay down their arms, and civilians who might be in the power of Japan, on land or sea, in territories occupied by Japan, and crews of ships destroyed by Japanese forces, in ruthless pursuit of victory in the unlawful wars in which Japan was or would be engaged during the period between 18 September 1931 and 2 September 1945, a conspiracy of this kind is beyond imagination; and because it was so ridiculous the Nuernberg Tribunal excluded such a charge from war crimes and crimes against humanity. (Decision and Judgment given on 31 August 1946, page 16,884.)

Furthermore, there is no evidence connecting MINAMI therewith or no showing that MINAMI ever held a position of such a nature or committed any act or issued any order as would make him responsible therefor.

In Count 53, the prosecution charges the defendant MINAMI for a conspiracy to order, authorize and permit the commander-in-chief of the several

Japanese naval and military forces in each of the several theaters of war in which Japan was then engaged, and the officials of the Japanese War Ministry, and the persons in charge of each of the camps and labor units for prisoners of war and civilian internees in territories of or occupied by Japan and the military and civil police of Japan, and their respective subordinates, frequently and habitually to commit the breaches of the laws and customs of war, as contained in and as proved by the conventions, assurances and practices, against the armed forces of the Republic of China and against many thousands of prisoners of war and civilians then in the power of Japan, and that the government of Japan should abstain from taking adequate steps in accordance with the said conventions and assurances and laws and customs of war, in order to secure observance and prevent breaches thereof, during the period beginning with the 18th of September, 1931.

Count 54 charges MINAMI for having ordered, authorized and permitted the same persons as mentioned in Count 53 to commit the offences therein mentioned.

Count 55 charges MINAMI for having deliberately and recklessly disregarded the legal duty to take adequate steps to secure the observance and prevent breaches of the said conventions and assurances, Laws and Customs of War, he being by virtue of his office responsible for securing such observance.

In relation to the above and to the balance of the charges, there is no evidence to connect MINAMI therewith. During the period from April to December 1931 when MINAMI was war minister and also from December, 1934, to March, 1936, when he was Commander of the Kwantung Army, there was, as a matter of fact, not a single prisoner of war in existence. We do not mean by this that there were no prisoners of war on the basis that the Manchurian Affairs was not a legal war. It means that captured Chinese troops and bandits were disarmed during this period and were either turned over to Chinese authorities or released on their avowal to become good citizens and there was no necessity for

Japanese guards to detain them. During his period of office, no harm was done to civilians in any fighting in Manchuria and none were detained as P. O. W's or internees. (C.R. p. 14370).

It must be pointed out, moreover, that no evidence was produced by the prosecution to show that MINAMI ordered, authorized and permitted any kind of offences in Manchuria and China, or that he had deliberately and recklessly disregarded his legal duty to prevent breaches of international law.

Same being respectfully submitted.

THE PRESIDENT: Mr. Cole.

MR. COLE: Now comes the accused MUTO, Akira, by his counsel, and moves the Tribunal to dismiss each and every Count in the Indictment in which he is accused, on the ground that the prosecution has failed to prove by substantial and sufficient evidence the offenses therein charged against him.

MEMORANDUM.

In addition to joining in the over-all motion to dismiss, the accused MUTO moves the Tribunal to dismiss the Indictment as to all Counts thereof in which he is charged.

The accused, throughout his career, has

been a military man. The record is completely bare of any evidence to show that he ever committed any act, at any time or place, which was not in accord with the highest traditions of military service, whether those traditions be of Japan or any other country. On the contrary, the evidence plainly shows that throughout the greater part of his military career he has held subordinate positions, in the sense that those above him were the ones to determine policies; and that his duty, by every recognized concept of the military throughout the world, was to carry out the orders of his superiors. We contend that this is a principle beyond argument and recognized by all the world, including the highest military men of the countries represented on this Tribunal.

This principle, and the complete failure of the prosecution to show that this accused committed any act outside the proper scope of his duties should require a dismissal of the charges against him. In brief, there is not one incident in the record to show that the accused did anything which others of comparable rank could not have properly done in any country in the world which has a military establishment.

For the sake of brevity, the various counts in the Indictment will be considered in groups.

Group One is composed of Counts 1 to 36, inclusive. The accused MUTO is named in all except Counts 18, 25, and 35. He is charged in taking part in the formulation or execution of a common plan or conspiracy, having planned and prepared a war of aggression, and having initiated and waged a war of aggression. The evidence discloses that the accused never at any time had a position which would permit him to formulate policies which would bind Japan or the individuals in power. Others above him were the ones who formulated such policies as existed.

Brief reference to the record will suffice to show how far the prosecution has failed to establish these charges against the accused. His tenure of office as Chief of the Military Affairs Bureau is relied on by the prosecution as proof of these counts. But no where in the whole record is there the slightest quotation of this accused to show the part he is supposed to have contributed. It is clear that he attended various conferences, by virtue of his office. But he attended them in

his minor capacity of "secretary", "exponent", or "explainer", to quote the documents in question.

We refer to Exhibits 649, 1030, 1241, and 1266, in all of which the accused is referred to as an "exponent" or "explainer". It is highly significant that in all these instances the accused's superiors were present. This in itself is enough to show that he was not a spokesman or policy maker. And it is more significant, not to say curious, that although minutes of such conferences and meetings were kept, as is obvious from the fact that what the prosecution considers important has been quoted, there is not one word of quotation of the accused throughout the entire record.

Further, as proof of the minor capacity of this accused in the conferences referred to, we quote from Exhibit 649, which was a meeting of the Privy Council regarding a protocol between France and Japan, held on 28 July 1941: "Chairman of the Committee SUZUKI ruled that the inquiries were over and requested the Cabinet Ministers and Explainers to retire. (Cabinet Ministers and Explainers retired)." In Exhibit 1266, which refers to a meeting of the

Investigation Committee of the Privy Council, 10 December 1941, it is said: "After the above-mentioned questions were completed, Chairman of the Committee SUZUKI, deeming that all the questions were over, asked the Ministers and Explainers to retire. (Ministers and Explainers retired)." Other examples to the same effect could be cited.

With reference to Exhibit 1103, it should be noted that the meetings or conferences referred to are proved, not by any official minutes or records but by an article from a newspaper. Why were no official records produced? If these conferences were of the grave importance attributed to them by the prosecution, it is highly improbable that newspaper men were allowed to attend. If they were not allowed to attend, it is absurd to assume that the list of persons attending or the matters discussed could have been determined by an outsider. This type of evidence is wholly unconvincing and the President of the Tribunal made pointed comments regarding this exhibit at Pages 10,054 and 10,056 of the record.

We call attention to Exhibit 1207-A, an excerpt from the interrogation of the accused TOGO. In speaking of the composition of a note, he says:

"The note itself was written by the Foreign Office, but the responsibility for the composition rests with the participating members of the liaison conference." Thus a significant distinction is made between those who, by their very duties, participated in such matters, and these who attended merely as secretaries or explainers. The importance of these latter has been shown to be negligible. We quote from Exhibit 1209, an extract from the interrogation of the accused TOJO: "There were also probably three other persons in the capacity of secretaries, for these three usually came to Imperial Conferences. These three were Mr. HOSHINO . . . Mr. MUTO . . . and Vice Admiral OKA." And further in the same document, "I am not positive that they were there." This, indeed, is strange proof of the importance of those whom the prosecution would like to describe as policy-makers.

It is claimed by the prosecution that the accused MUTO was appointed to various committees, etc., the claim being that such committees were parts of the common plan or conspiracy, but it is curious that there has been a complete failure on the part of the prosecution to show the accused MUTO's par-

"The note itself was written by the Foreign Office, but the responsibility for the composition rests with the participating members of the liaison conference." Thus a significant distinction is made between those who, by their very duties, participated in such matters, and these who attended merely as secretaries or explainers. The importance of these latter has been shown to be negligible. We quote from Exhibit 1209, an extract from the interrogation of the accused TOJO: "There were also probably three other persons in the capacity of secretaries, for these three usually came to Imperial Conferences. These three were Mr. HOSHINO . . . Mr. MUTO . . . and Vice Admiral OKA." And further in the same document, "I am not positive that they were there." This, indeed, is strange proof of the importance of those whom the prosecution would like to describe as policy-makers.

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ticipation in the work of such committees, his attendance at meetings, or indeed whether any meetings were held. It is absurd to claim that the accused participated in a plan or conspiracy of such magnitude, and then to fail to show any official act or utterance made by that accused in the meetings or conferences in which such alleged plan or conspiracy was originated, forwarded, and executed.

As to the Counts of Group One dealing with initiating and waging of war of aggression, it is contended, and the records show, that the accused was never in a position of power sufficient for that purpose. There is nothing in the record in this respect to show anything but his devotion to duty as a military man, the doing of his duty as imposed upon him by his superior officers.

Groups Two and Three will be considered together for the sake of brevity. Group Two includes Counts 37 to 52 and all are charged against this accused with the exception of Counts 48, 49, 50 and 52. He is charged under Counts 53, 54, and 55, which compose Group Three. These two groups charge murder, conspiracy to murder, to authorize and permit violations of laws of war, and disregard of duty in regard thereto.

The prosecution has failed completely to establish such charges against the accused. They have shown no conspiracy, and surely no participation by this accused in such an alleged conspiracy. There is not even a hint of evidence to show that this accused murdered any person, knowingly permitted the murder of any person or approved of any alleged murder after it was committed. The same applies in full to all violations complained of in these counts.

With particular regard to the matter of Prisoners of War, to take an example, the testimony is muddled at best and totally insufficient to establish the faintest degree of guilt upon this accused. A great amount of evidence was adduced to show that Prisoner of War policies were handled through the Military Affairs Bureau of the War Ministry, but this evidence is garbled and totally unconvincing. Further, the accused MUTO held the office as Chief of said bureau only until 20 April 1942. The only matter shown to have transpired during the period from the outbreak of war to 20 April 1942 regarding Prisoners of War is the exchange of notes which established policies. It is important to

note that it was after the accused MUTO had left this office -- in late April or early May -- the testimony is conflicting here, too -- that Prisoner of War policies complained of by the prosecution were adopted.

Regarding atrocities and Prisoner of War matters in the field, it should be noted that the accused held only one position in which he had anything approaching command responsibility; from April 1942 until October 1944, while he commanded the Imperial Guards Division in Sumatra. During that entire period there was no fighting in Sumatra, no prisoners were taken, and those prisoners who were confined in camps in Sumatra were already reported to Tokyo and were under the control and direction of higher authorities, as the evidence clearly shows. The evidence further shows that Prisoner of War matters were handled almost exclusively through other than the regular channels of command, for the sake of expeditiousness, and thus did not involve this accused.

To conclude, it is respectfully contended that the evidence shows that the accused MUTO was in subordinate positions at all pertinent periods,

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To conclude, it is respectfully contended that the evidence shows that the accused MUTO was in subordinate positions at all pertinent periods,

was never on a policy-making level, and could not and did not commit the acts charged to him in the Indictment. The prosecution has failed wholly to prove the offenses therein charged.

THE PRESIDENT: Colonel Warren.

MR. WARREN: If the Tribunal please, before commencing my argument I should like to make this observation. In view of the Tribunal's ruling with reference to statements of co-defendants made after the consummation of the alleged conspiracy, it is submitted that virtually all of the State's case with reference to OKA has fallen.

In presenting arguments on behalf of the accused OKA with reference to his motion to dismiss, counsel, for the sake of brevity, will not argue each individual count and will confine themselves to the overall evidence bearing on this defendant. It is our contention that there has been insufficient evidence adduced by the prosecution to prove each element of each offense charged in the Indictment and that, therefore, the accused OKA should not be required to assume the burden of proceeding and introducing evidence in his own behalf.

There has been no contention on the part of the prosecution at any time that the defendant OKA acted in any capacity other than with regard to his duties in the Navy of Japan; consequently the position of the Navy is of great importance in deciding the issues with reference to this defendant.

What, then, was its position? The answer is clear. The position of the Navy in opposing war has at all times been well defined. As late as the Third KONOYE Cabinet it remained adamant in its position that war should be avoided if at all possible. Reference is made to page 10,254 of the transcript of evidence for November 12, 1946, wherein the then Navy Minister OIKAWA made plain the Navy's position. This particular part of the evidence is a quotation from the Memoirs of the then Prime Minister KONOYE who states that OIKAWA made the following statements which are here quoted and are extracts from the transcript of evidence.

"Let us leave the decision as to whether there is any hope for a successful conclusion of the diplomatic negotiations in the hands of the Prime Minister and the Foreign Minister, and as for the Navy, she will comply with that decision***."

"If there is any hope for a successful conclusion of the diplomatic negotiations, we want the negotiations to be continued***."

"That is if we are to rely on diplomatic negotiations, we would like it to be carried out thoroughly***We want to make it a success

at all costs***We want the decision of the Prime Minister***We want to comply with this decision."

Continuing with his statement, the then Prime Minister KONOYE made an additional remark which appears of record at page 10,263 of the transcript of the evidence, and which is here quoted:

"In the meantime it became gradually known ***that since the Navy herself had not the will to fight, but couldn't say so herself, she was appealing to the Premier through Bureau Chief OKA by the way of Chief Secretary TOMITA for the Premier to express it***."

"As an outcome of it, Chief MUTO of the Military Affairs Bureau called on Chief Secretary TOMITA and reportedly requested that the Navy be asked to make a definite statement at this time. Hence, when Chief Secretary TOMITA relayed this to Chief OKA of the Navy Affairs Bureau, Bureau Chief OKA reportedly stated that the Navy, as usual, cannot say it and that she can say no more than that she will comply with the decision of the Premier***."

There is other evidence in the record, which the Tribunal will recall, that corroborates these

quoted statements of the then Prime Minister KONOYE. At this time when the negotiations referred to were being carried on between the Prime Minister and the Navy Minister, it is clear from the evidence that the acts of the defendant OKA were his official acts as liaison officer and he was merely delivering messages of higher officials. In view of the fact that it is clear from the evidence that the Navy did not want nor desire war at that time and that it was the Navy's hope that the negotiations to avert war would be successful, it does not follow that any logical conclusion may be drawn from the evidence which would support the prosecution's contention that the accused OKA aided, abetted, assisted, participated or otherwise engaged in any common plan or conspiracy to wage aggressive war, or a war of any kind, but that, on the contrary, he and his superior officers diligently attempted to avert war.

There is evidence that the defendant OKA attended certain liaison conferences and Imperial Conferences held during the year 1941, but there is no evidence to show that he did at any time voice or express an opinion in such meetings, other than to answer questions propounded to him by participating members concerning technical or factual matters which

might be expected to be within the knowledge of a person occupying the subordinate positions which the evidence indicates he held from time to time. It is suggested that all the evidence introduced concerning him shows that his position was at all times that of a secretary and of a liaison officer, and that he never did attain a position which would place him on a policy-making level. Messages conveyed by him or prepared by him or his subordinates contained the decisions of his superior officers; and there is no substantial evidence to indicate that he at any time influenced such decisions.

There is some evidence that the accused was present on November 5, 1941, at an alleged Imperial Conference in which decisions were reached concerning Japan's attitude toward various nations in the event of war. The evidence with reference to this incident plainly shows that in addition to the presence of the accused such conference was also attended by the Navy Minister. There is no evidence to indicate that the accused was a participating member of this conference or that he acted in any manner other than that of a secretary.

In support of the contention concerning the position of this defendant, reference is made to

exhibit 1209, which is an extract from an interrogation of Hideki TOJO concerning a similar Imperial Conference held on December first or second in which he gives the names of certain persons who attended such conference and states concerning them:

"These were the responsible people who were there***."

In continuing his statement he says:

"There were also probably three other persons in the capacity of secretaries, for these three usually came to the Imperial Conferences. The three were the Chief Cabinet Secretary Naoki HOSHINO, Chief of the Military Affairs Section of the War Ministry, Mr. Sho MUTO, Chief of the Military Affairs Section of the Navy Ministry, Vice-Admiral OKA.***I am not positive that they were there***."

This remark becomes significant in view of the fact that so unimportant was the accused OKA in the minds of those responsible persons who attended such conferences that Hideki TOJO was not even certain they were present but they may have been because they were secretaries that usually attended. The only logical conclusion which can be drawn is that when the defendant OKA attended such meetings, he attended,

not as a responsible person, but in the capacity of secretary.

Reference is again made to the evidence which indicates that the accused OKA attended liaison conferences during the year 1941. The evidence with reference to these conferences indicates just as strongly that the accused acted in his accustomed capacity as secretary and not as a participating member. There is no evidence to show that he participated in any of the decisions or that he wielded undue or great influence upon his superior officers who were always in attendance at such meetings. It is contended that the accused cannot be chargeable with the acts and decisions of his superior officers.

It is suggested that at best the evidence upon which the prosecution relies to show the presence of this defendant and other persons at the liaison conferences has little evidentiary value. It is significant that the accused OKA never attended any such meetings unless there was also present an officer superior in rank and on a policy-making level. The evidence relied upon to show the attendance of persons at such conferences appears to be an extract from an article which appeared in the newspaper "Asahi" introduced as exhibit 1103. In commenting upon the

introduction of this particular document at page 10,054 of the transcript of evidence, the President of the Tribunal made the following observations:

"Well, is there any part you would like to point in particular? It may be an extremely useful document, but there is no advantage, so far as I can see, in reading it into the transcript if the nature of the business is so indefinite***."

"You might consider for what purpose you are really introducing this***."

And on page 10,056 there appears this additional remark,

"This document at this state of the transcript would be no more useful to us than the exhibit itself if omitted from the transcript***."

In analyzing this documentary evidence it does not appear to counsel that it would be logical to reach the conclusion that newspaper reporters were permitted in the conference rooms. Otherwise, it seems certain that the prosecution would have been able to produce news stories concerning the topics under discussion and that such topics would not have to be referred to any such vague and indefinite terms

as "exchange of views", "exchange of information on important matters", or "discussion of important matters". Apparently news reporters were not permitted to attend these conferences and, therefore, it is not illogical to conclude that perhaps upon many occasions, when the defendant OKA was alleged to have been present, he was merely present in the chambers where the conferences were held in order that his services, if needed, would be available to those on policy-making levels and that he was not physically present in the actual conferences themselves. In this connection it is believed significant that many of the reports do not list him as present but in each instance where he is listed his superior officer was in attendance.

The capacity of the accused at such of the liaison conferences as he did attend is explained in exhibit 1207A, which is an extract from the Interrogation of Shigenori TOGO. This extract is with reference to a note written by the Foreign Office of the Japanese Government concerning negotiations with the United States in which appear the following statements:

"The note itself was written by the Foreign Office, but the responsibility for the composition

rests with the participating members of the liaison conferences***."

In the same document is the additional statement:

"As I have said at a previous meeting, members of a liaison conference who were responsible for the study and discussions on the matter were TOGO, SHIMADA, SUGIYAMA, NAGANO, TSUKADA, ITO, KAYA, SUZUKI, and the three secretaries -- HOSHINO, MUTO and OKA. As to the members of the Cabinet, under the constitution they were responsible for decisions of the Cabinet even on matters outside of their respective offices***."

It is clear from the extracts of the documents here quoted, that is to say, exhibits 1209 and 1207A, that Imperial Conferences and liaison conferences were attended by two separate categories of persons, one referred to as the responsible or participating members and the other as secretaries. In each instance the line of demarcation is clear and the evidence leaves little room to doubt that those in the capacity of secretaries were of little or no importance in so far as the participating

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or responsible members were concerned. The last quoted statement from exhibit 1207A might be confusing inasmuch as it refers to the members of a liaison conference who were responsible for the study and discussions on the matter. However, it is believed that if the entire document is taken as a whole, the only construction that can be placed thereon is that the secretaries, as such, were not participating or responsible members of such committees.

There is also evidence that the accused OKA attended a meeting referred to as the "Assembly of Greater East Asiatic Nations' Joint Declaration Adopted on November 6, 1943." This is set out in exhibit 1346 and appears of record at page 12,098 continuing through page 12,102. In examining this evidence it is again disclosed that the defendant OKA accompanied his superior officer. In analyzing all of the evidence in the record concerning meetings attended by the accused OKA there is not recorded one single instance when he attended a meeting in the absence of a superior officer on a policy-making level.

In view of these facts, it is the contention of counsel that the defendant OKA always acted in a

subordinate manner without power to make important decisions and without power to engage in discussions except when asked. To further bolster this contention reference is made to exhibit No. 649 which is used only as an example because other exhibits will disclose the same situation. However, they are not dealt with here for the sake of brevity. On page two of the document appear the names of persons referred to as explainers. Among them appears the name of the accused OKA. This exhibit refers to a meeting of the Privy Councillors. After a full and complete discussion was had concerning the business in hand, explainers and ministers present were requested to retire after which the Privy Councillors conferred among themselves and arrived at their own conclusions.

In this argument it has been the intention of counsel to refer to each instance in which the name of the accused OKA appears in the transcript of evidence and to refer to those documents which appear most likely to shed light upon his activities. Reference has not been made to all documents which might in some manner affect the accused; and if a discussion of any document which might be pertinent to the issues has been overlooked, it is not intentional.

The Honorable Mr. Justice Mansfield in presenting that phase of the prosecution's case dealing with the events under Article 5B of the Charter states in substance that copies of the complaints lodged by the Swiss Legation as protecting power on behalf of the United States, Great Britain, Australia, Canada and New Zealand were transmitted to the Foreign Ministry, to the War Ministry, Navy Ministry and Home Ministry, and draws the conclusion that the accused OKA by virtue of his office was guilty of making misleading statements. This statement, of course, is of no evidentiary value and is merely a conclusion on the part of the prosecution which appears to be nowhere substantiated in the evidence. That is to say, there is no substantial evidence to indicate that the accused OKA had at any time command functions which would give him power to issue orders respecting treatment of prisoners of war. Apparently the only power he did possess was that of drafting notes in reply to inquiries presented through the protesting power by the various nations and to return such replies through the proper channels and his superior officers. There is no evidence that the accused personally drafted any such notes or that he had any knowledge

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of the mistreatment of prisoners. On the contrary, the evidence as a whole tends to conclusively prove that the only information available to the accused was official information furnished his department by other agencies properly charged with the knowledge and administration of such matters.

In conclusion it is respectfully submitted that the evidence taken as a whole proves conclusively that the accused OKA acted in a subordinate manner at all times, was never on a policy-making level, and that, therefore, he could not have been guilty of any of the crimes lodged against him in the indictment and that consequently the prosecution has wholly failed to produce any substantial evidence which would be sufficient to warrant holding the accused for any further action before this Tribunal.

All of which, your Honor, is respectfully submitted.

THE PRESIDENT: We will adjourn until half-past one.

(Whereupon, at 1200, a recess was taken.)

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Whalen & Morse

MARSHAL OF THE COURT: The International Military Tribunal for the Far East is now resumed.

THE PRESIDENT: Captain Brooks.

MR. BROOKS: Now comes OKAWA, Shumei, by his counsel, and respectfully moves the Tribunal to dismiss each and every one of the counts in the Indictment against said defendant on the ground that the evidence offered by the prosecution is not sufficient to warrant a conviction of said defendant.

In support of the motion to dismiss on behalf of OKAWA, Shumei, argument will be presented in a general and limited way as to all counts of the indictment, because of the time limit, and also because of the limited amount of evidence against OKAWA, under the charges made by the prosecution; we submit the prosecution has failed to connect OKAWA with any unlawful or illegal act, or crime and the prosecution has failed to prove that OKAWA, individually, or with any other divers persons, committed any of the acts charged by the Indictment, or that OKAWA was ever in a position of power, or responsibility, such as would enable him to have acted as charged, if such inclination was proved. We submit that early in this case the prosecution's own witnesses testified that OKAWA was by profession a teacher of History in the Imperial

University, and a writer, and that his living was derived from such efforts.

The books he wrote were his interpretation and recording of current historical events, discussions on colonial and diplomatic matters, and he did not advocate, or publish the material in said books, because of personal ambitions or with criminal intentions and motives, and the prosecution's evidence does not prove otherwise.

In relation to the March and October Incidents, prosecution's own witnesses have testified that these local political Incidents had nothing to do with any war, or international situation, at that time or later, and that domestic problems, corrupt politics, and political struggles between rival political groups to bring about internal reform was the basis for such incidents, actions, and demonstrations as transpired.

We submit that possibly through misunderstanding or because of translation difficulties and not being thoroughly acquainted with Japanese activities and the conditions of the time, the prosecution placed undue emphasis on these incidents; they believed that if 300 bombs were to be used, in what they thought, and charged, was an attempt to destroy the Diet Building that this must be incorporated for examination by

the Court, but our submission is made very clear, when on cross-examination it was found that this was only a political demonstration, such as we see nearly every week in Japan, and the bombs were naught but firecrackers, and that KOISO, acting on orders of higher authority, seized the firecrackers and ordered OKAWA and the others to abandon said demonstration. The evidence shows this fact and confirms that matters in issue were purely domestic issues, and that said incidents failed to achieve any change, and that during the time, or thereafter, no position of responsibility or trust was sought or obtained by OKAWA, thus, we submit that all said counts and charges against OKAWA should be dismissed.

We further submit that in the trial that followed covering such incidents as set out in exhibit 2177, OKAWA was censored for his political activity, and although he tried to explain the same, however as a result of this series of trials instituted by those government officials in power, OKAWA was removed fomr the political scene by sentence of the Court to five years imprisonment for his part in such activities, which sentence OKAWA duly served, as the prosecution were willing to stipulate and agree.

We submit it is illogical to charge OKAWA

with being a conspirator as set forth in the Indictment, for had he been in any conspiracy with those in power, or control of the Japanese Government, as alleged by the prosecution, would they have stood silently by, and let him be tried, if he had been aiding, abetting and assisting their cause, or would they have caused his arrest and allowed him to remain in prison to serve a five years sentence if he were a fellow conspirator? Furthermore, how could OKAWA conspire as charged during the years that he was in prison, and is it logical that such charges made by the prosecution are well founded?

We submit that another matter is raised, if we assume for argument, that, prior to said trial the actions of OKAWA had unlawful and criminal significance and he was called to account therefor, then what is the effect of this former trial, conviction and punishment for activities previous to said date; can said defendant be tried again, or for any other offense if either offense is necessarily included in the other? We submit these matters should be considered in Bar of trial and as to their placing said defendant in double jeopardy as a result of this trial.

Wherein counsel moves that all counts pertaining hereto be dismissed as against defendant OKAWA.

Furthermore, the prosecution has failed to show any connection, between OKAWA, and any other defendant, or other divers persons, acting in conjunction with OKAWA, to be responsible or to have had any part in any unlawful activity after his release from said prison on completion of said five years sentence. Therefore, since no evidence against OKAWA has been introduced by prosecution and he has not been mentioned or connected with either the China Incident, or the Pacific War that followed in 1941, and thereafter, we submit that said counts as they pertain to OKAWA should be dismissed for lack of evidence.

In the opening phases of this case a personal record was presented on every defendant except OKAWA. This is understanble as OKAWA was never in military service, because of being physically disqualified therefor from youth, and since OKAWA had never held any political office there was no political record. The only record of OKAWA is that of his student days showing his training to become a teacher of the History of Colonization by foreign powers, and he wrote, during vacation periods. However, if a check is made on the dates of publication of his books, we find that his greatest period of literary activity was during his

time in prison when he was serving the five years sentence previously referred to and the proceeds from the sale of these books went to support his family during said tragic years of his life as a political prisoner.

The only evidence presented against OKAWA in relation to the Manchurian Incident was very sketchy and hazy and based entirely on hearsay testimony, without the chance for cross-examination or confrontation of said witness, and it was only to the effect that OKAWA expressed no surprise for such an incident, and what followed, as from current events and knowledge of anti-Japanese sentiment in China, such an action was sooner or later, more or less, expected but there is no evidence that OKAWA participated, planned or had knowledge and assisted in any of the acts charged by the counts in relation thereto. Wherein such counts should be dismissed as against OKAWA.

The evidence of the witness TANAKA and of the witness SHIMIZU make it very clear that OKAWA is not guilty as charged.

There is no evidence that OKAWA had any connection with diplomatic negotiations, or with initiating any hostilities, and the evidence as to murder counts, atrocities or the case for prisoners of war

do not charge OKAWA with any participation or responsibility therein; nor was OKAWA charged as participating in any of the Important Liaison and Imperial conferences of Cabinet meetings throughout any period of the Indictment; and as to conventional war crimes and crimes against humanity the attention of the Tribunal is called to the fact that OKAWA is not named or shown to have been connected directly or indirectly therewith by even a scintilla of evidence.

Wherein such counts should be dismissed as against OKAWA.

It has not been shown by the prosecution that the accused had guilty knowledge or a malicious intention or criminal motive for or behind any action of said defendant during said periods covered by the counts of said Indictment or that he either objectively or subjectively committed any act that was a crime or unlawful as alleged in said Indictment.

Furthermore there has been no showing that any of the articles written by OKAWA were used by the Japanese Government or by any of the accused in making any important decision, charges, formulation of policy or otherwise, and furthermore even had such articles been so used for an unlawful purpose, there has been no evidence to show that the writer thereof had

knowledge that they would be so used, or intended for same to be used for such criminal purpose, or that they could or would be used in such a manner if said fact had been proved to be true.

Many books, articles and expressions of personal opinion are daily made in every democratic country in the world, under the right of free speech, and rights established for freedom of the press, and freedom of speech and expression is a prerogative that has been encouraged and guaranteed, and though such expressions may influence decisions and policies of government, it is only by the process of adoption, and making them the opinion of the government official, with such modifications and changes, and for such purpose as he has in mind, does such result occur and the writer does not get credit or share in the responsibility therefor.

In view of the limited activity of OKAWA and his civilian status and background as has been brought out in prosecution's evidence, and as he was considered as a crackpot writer by high authorities, it is impossible to conceive that he was ever in a position of such influence and authority as it would be necessary for him to have had, to be able to formulate and direct the foreign policies of Japan in any

such way as the prosecution has tried to lead the Tribunal to believe.

The Tribunal is requested to consider that had OKAWA been sane during the period 1928 to 1945 that there is insufficient evidence to convict him of any of the charges made, and we submit that the Tribunal should clear this defendant of any charges of guilt, so that his small home and property may be released from government control for the benefit of his family and so they may utilize what little money he has accumulated from his writings to pay his hospital and institutional expenses.

We submit that since the evidence has been necessarily heard, and OKAWA has been represented daily in Court, to avoid leaving any cloud on OKAWA's past record and also to avoid the expense of or necessity for a trial at some future date over this same evidence.

The Court's action on this motion should be taken for if said motion to dismiss is granted defendant is not prejudiced or harmed thereby and if it is denied then the question of sanity during said period may be determined.

Wherein we respectfully request all counts against OKAWA and that a finding of not guilty be

entered, and that OKAWA be released to the custody and care of his family and legal representatives.

All of which is most honorably submitted.

THE PRESIDENT: Mr. Cunningham.

MR. CUNNINGHAM: If the Tribunal please:

Comes now the accused OSHIMA, Hiroshi, and respectfully moves the Tribunal to dismiss the charges contained in the Indictment as to him, on account of the insufficiency of the evidence to prove his participation in any conspiracy as charged, or his commission of the offense of murder, or any crimes against humanity, or his violation of the rules of land warfare, or any other offense described in the Charter or Indictment or counts thereof.

The following points are submitted for the consideration of the Tribunal:

1. That the evidence fails to show that the accused OSHIMA was a party to any agreement, plan or conspiracy which had for its purpose the initiating or waging of any war of aggression.

The evidence fails to show that the accused OSHIMA was a member of any group, organization, or association which had for its purpose aggressive war or any object which was contrary to international law, treaties, or assurances.

That the evidence fails to show that the accused OSHIMA was within the jurisdiction of this Tribunal when the acts complained of were committed, particularly the charge of murder, crimes against humanity and conventional war crimes; but the evidence discloses that the accused OSHIMA was in Europe at the times when the acts complained of were committed.

The evidence fails to disclose that the accused OSHIMA held any position in the Japanese Government to which any criminal responsibility was attached, for acts committed in the performance of the duties of the office; but the proof discloses that he was an ambassador when the acts complained of were committed and therefore immune by virtue of the rights, privileges and protection afforded his office under the rules of international law -- set out more fully in the brief to be submitted.

The evidence fails to sustain the charges contained in the Indictment, but does establish that the accused OSHIMA was a personal representative of the sovereign of Japan and that his acts were not personal but the acts of state, therefore not punishable under international law by virtue of their nature.

The evidence fails to show that as a diplomatic agent of Japan the accused OSHIMA received instructions to do anything which was beyond customary diplomatic protocol, or beyond his authority as Ambassador; but has established that all negotiations and instructions were in compliance with the established policy of Japan and in conformance with the laws of Japan.

The evidence fails to show that there was any effective collaboration between the German and Japanese Governments, or military or naval forces; but proves that the relationships between the two nations were created by treaties, agreements, and alliances entered into through the established governmental channels.

The proof fails to establish that any of the acts complained of in the Indictment were performed in a manner contrary to international law and custom; but the facts prove that the acts complained of were performed in the manner required and in the manner prescribed for the conduct of Ambassadors in international relationships by international law and custom.

The evidence fails to show that the accused OSHIMA performed any tasks other than those required

of his office.

The evidence fails to establish that the accused OSHIMA was a policy maker in the Japanese Government, or that he was an official of the Japanese Government within the contemplation of the amended Charter, or that he exercised any governmental political control, or military command over Japanese forces.

The evidence fails to establish any tangible relationship between the accused Ambassador and the political administration of Japan; but the record discloses that he served under nine different Foreign Ministers during his tour of duty as Ambassador, and that the interpretation and translation of their policies differed according to the policy of the cabinet in power.

The evidence fails to prove that any of the administrative acts of the accused OSHIMA were illegal, but the evidence discloses that they were based upon the established policy of the Japanese Government, were legitimate exercises of the powers given to persons of such responsibility, and were consistent with the Imperial policy and political decisions of the Japanese Government.

That the prosecution has failed to prove that the acts of the accused OSHIMA were contrary to law, that

they were contrary to the law of the country of his ambassadorial residence, that they were prohibited in the land of his permanent residence, or that they were in violation of any of the laws of any of the complaining nations at the time of their commission. It is established that the acts of the accused OSHIMA in the performance of his duties were exempt from judicial inquiry in the country of his ambassadorial residence, were within the law of his permanent residence, and were permitted by international law and custom.

The record is silent as to any participation of the accused in the Manchurian and China Phases; and there is insufficient evidence to establish the guilt of the accused in any other phase of the case. The proof discloses affirmatively that the accused OSHIMA was kept in the dark concerning the events leading up to the war between Japan, United States, Great Britain, Philippines, Netherlands, and the other Allied Powers.

There is no evidence to sustain the charge that the accused OSHIMA committed any offense against humanity, or violated the rules of land warfare in any respect. The Counts 53 to 55 charging these offenses to the accused should be dismissed as to him.

That the Prosecution does not sustain the charge that the accused OSHIMA participated in any plan or conspiracy to violate international law, treaties, or assurances.

That the prosecution has failed to establish that the accused OSHIMA committed any of the offenses described in the Indictment, or that the acts of omission or commission of ambassadors were contemplated in the definition of the offenses described in the amended Charter.

18. Concerning the individual Counts the accused OSHIMA states that there is insufficient evidence to prove his guilt under the following Counts, and moves that they be dismissed as to him for the reasons set forth:

Count I. The charge is indefinite and the evidence too abstract to establish proof of commission of any of the offenses charged in the Count.

Count 2. The prosecution has failed to prove that there was a government in existence in the territory described in the Count capable of protecting life, property and interests which had been acquired under treaties and agreements, but the proof affirmatively shows that Manchukuo having become an independent state, the issues raised in Count 2 have been

adjudicated politically through the only means available at the time.

Counts 3, 6, 27 and 28, eliminating 19. Under these Counts the prosecution has failed to present sufficient evidence to establish a prima facie case showing that the accused OSHIMA had any connection whatever with the China conflict, except that he used his best efforts to secure mediation and settlement through the good offices of third parties.

Counts 4 and 5. These Counts contain numerous charges which are not sustained against the accused OSHIMA. There is a misjoinder of causes and complainants in these Counts which has neither been justified nor authorized under the amended Charter.

Count 6 is the same as Count 3.

As to Counts 7 to 13, 20, 21, 22, 29, 30 and 31, the prosecution has failed to substantiate these Counts but has proven by the greater weight of the evidence that the settlement of the dispute between the United States, Great Britain and the Commonwealth of Nations was impossible of disposition by pacific means.

Counts 14 and 32: That the evidence fails to establish a just cause of complaint under these Counts, for the reason that no act of aggression has

been proved; on the contrary, the Government of the Kingdom of the Netherlands violated conventions and treaties by making a sudden and unexpected declaration of war against Japan. There is a misjoinder of complaining nations under these Counts.

Count 15, eliminating 23 and 33; there is a question as to whether or not those Counts cover this accused. The proof fails to sustain this Count, but shows that the action taken by the Japanese Government was in accordance with agreement between the Japanese and French Governments as it existed at the time. This Count presumes the existence of the "Republic of France" which has not been proved by any evidence introduced in this cause.

Counts 16, 24 and 34. The evidence fails to disclose that the Kingdom of Thailand and the Mongolian Peoples Republic are authorized complainants in these proceedings and no evidence has been introduced to sustain the charges as against the accused OSHIMA.

17. The charges in these counts have not been substantiated. Striking the rest of that allegation--

Counts 37 to 44 inclusive. These Counts should be dismissed as to the accused OSHIMA for the

reasons set out in Paragraph 3 of this Motion, and more particularly for the reasons set out in the objection to the introduction of evidence made in behalf of the accused OSHIMA, and set out in Appendix 18 in the brief. Also, for the further reasons that the Charter does not contemplate a charge of conspiracy to commit murder or other crimes against humanity, and that the proof does not sustain the charge of personal responsibility of the accused OSHIMA for any of the offenses described. The proof does not define the crime of murder or conventional war crimes which strictly defined are restricted to military responsibility, whereas crimes against humanity require venue, presence personally, overt acts and a specific violation against some established law of a specified country. No such offense has been proved. Therefore, Counts 37 to 44 inclusive should be dismissed as to the accused OSHIMA.

Counts 53, 54 and 55. These Counts should be dismissed as to the accused OSHIMA for the reasons stated in Paragraph 15 of this Motion and more particularly set out in the objection to the evidence in the atrocity phase of the case. Said objection found in the official record on pages 11,405, 11,406 and 11,407, dated 27 November 1946, and are hereto referred to and

made a part of this Motion by this reference in Section 18 of the Brief and Memorandum filed herewith. I believe the brief will be distributed during the day. Prosecution has failed in its responsibility to establish that the complaining nations have performed their reciprocal obligations under the rules of land warfare before having recourse to complain against the Japanese. That by resorting to inhuman illegal methods to subdue Japanese armed forces and to destroy the morale of the Japanese war effort, the complaining nations have forfeited any right to punish violators of the rules of land warfare in their own right.

19. The evidence proves conclusively the following:

(a) That the Japanese form of government with its checks and balances provides a system which is incompatible, irreconcilable with the theory of conspiracy charged by the co plaining nations against the accused OSHIMA in this cause.

(b) That the foreign policy of Japan was always in the hands of the government alone.

(c) That the acts complained of as respects the accused OSHIMA were committed in the lawful exercise of his function as the agent of a sovereign nation.

(d) That the accused OSHIMA held no power or influence sufficient to place him in a position to commit the offenses charged against him in the Indictment.

(e) That the decisions leading to war were accomplished through the established governmental channels. The complaining nations have waived their rights by negotiating and making agreements with the same governmental officials as they charge with conspiracy in the Indictment.

(f) The acts complained of in the Counts naming the accused have been judicially and politically determined and settled by treaties, non-aggression and mutual assistance pacts and by financial settlement according to the only existing legal processes as of the time of their commission. This was accomplished further by applying economic sanctions, embargoes, freezing of assets, and all other acts short of war, and by electing to have recourse to war to determine the issues.

I have submitted an amendment on 20 which I think has probably been circulated as a correction.

THE PRESIDENT: Read it as corrected.

MR. CUNNINGHAM: Has it been received? I read it as corrected.

The record fails to establish the following vital elements of proof which are indispensable to permit a finding by the Tribunal that the evidence offered by the prosecution is sufficient to find the accused OSHIMA responsible under any Counts of the Indictment.

(1) That the acts complained of were criminal at the time of commission.

(2) That the complaining nations are authorized to join in these proceedings.

(3) That the prosecutors are empowered to represent humanity or mankind.

(4) That conspiracy is a crime recognized by International Law.

(5) That the amended Charter is in conformance to the Potsdam Declaration.

(6) That the Indictment complies with the amended Charter or that the Japanese Government was controlled by any group of the accused at any time during the period covered by the Indictment.

(7) That the presumption of self-defense was overcome.

(8) That the appointing authority has power or authority over the persons of the accused in this cause.

(9) That the Members of the Tribunal are legally appointed and sworn to administer any established system of laws, universal in character, enforcible by judicial order; or that the scope of this inquiry is unlimited.

(10) That the record embraces basic documents

upon which this Tribunal bases its power; but only an unsigned mimeographed copy of an amended Charter, which fails to satisfy its own requirements as documentary evidence, is of record.

(11) That there is no evidence on record to show any international agreement, treaty or convention creating this Tribunal as in similar cases provided.

THE PRESIDENT: Of course, many of these submissions are outside the scope of the motions which we permitted. Nevertheless, we will be satisfied to keep that in mind.

Now, talking of "(10)", I might scotch this thing at once. An unsigned mimeographed copy is a mistaken description of the document. The person who signs the wax sheet intends that every copy shall be a duplicate or a triplicate,and so on; and you can use a duplicate or a triplicate as much as the original. Obviously, the wax sheet is never intended to be the original. In any event, it is for us to say what we will accept as proof, if proof be needed, and if we cannot judicially notice our own existence. However, it may be thought by one or more Members of the Court that the wax sheet is the original.

MR. CUNNINGHAM: My only thought, your Honor, was that the original Charter of January 19 probably

should be on file together with the amendment, showing that the amended Charter modified the original Charter and the chain of events which led to exhibit 10, being the official record of this Court's existance. That was my only thought.

THE PRESIDENT: Well, we will say no more about it for the time being.

MR. CUNNINGHAM: With the exception of isolated instances the facts of the case disclose that the only acts upon which the prosecution relies for implication of the accused OSHIMA were those committed while he was military attache or ambassador plenipotentiary in Germany. The record sets forth that 9 foreign ministers directed the foreign policy of Japan during the seven year tour of the accused. From this and other facts it must be evident that the foreign and domestic policy of Japan towards Germany varied, as the different Cabinets which directed the destiny of Japan while the accused was in Europe, rose and fell. There is no logical way to connect this accused with the charge of conspiracy. If unity of purpose or continuity of plan is an essential element of the crime, this link is certainly missing in this instance.

If participation in the deliberation of policy and decisions as to the course to be followed by the

Japanese Government is at all required to establish responsibility of the accused for the initiation of or planning for war, then the accused OSHIMA must be excused for he was never an official charged with decisions or allowed to participate in the deliberation leading to decisions. The second link of the chain is also missing.

If criminal intent, knowledge of illegal plan, consent or agreement are indispensable elements, and positions or influence necessary to carry out the plan can be attributed to one of the Japanese Empire's ambassadors, then there must be absolute proof as to the essential elements in order to establish guilt.

The facts bespeak the opposite in the case of the accused. His sincerity of purpose, his limited access to governmental processes, the impossibility of the exercise of discretion or choice in the performance of his duties add greatly to his presumption of innocence. "Instructions" was the keynote of the accused OSHIMA's relation to his government. The chain of evidence has omitted another important link.

All decisions for the Japanese Government were made in Tokyo; decoding and transmission through diplomatic channels only were handled by the accused OSHIMA, but this to a very limited extent. Can it be said or read in any degree of fairness from the record that the

Japanese Government is at all required to establish responsibility of the accused for the initiation of or planning for war, then the accused OSHIMA must be excused for he was never an official charged with decisions or allowed to participate in the deliberation leading to decisions. The second link of the chain is also missing.

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accused OSHIMA could determine what was coming next from Tokyo, or what he would be asked in Berlin to transmit to his government? Common knowledge tells us that an ambassador is only a person who receives instructions and who reflects reactions; diplomacy will not admit greater participation. A nation's policy is formed by its leaders at home and the proof does not indicate that the accused OSHIMA exercised any influence whatever in this determination.

If sovereignty has lost its right of representation with immunity in international relations; if freedom from restraint is no longer an attribute of its agents; and if diplomats are now required to pattern their negotiations and operate with the fear of punishment if their mission fails; and if the ordinary consequences follow their errors of judgment, then perhaps the acts of the accused are within the scope of this inquiry.

But if nations continue to carry on diplomatic relations, if world citizenship is to be enjoyed by spokesmen, if each nation is to have its seat at the table of family of nations, then ambassadorial immunity will continue to be a measure by which the acts of the sovereign representatives will be protected.

If the official acts of the accused OSHIMA

furnish a link in the chain of evidence from what proof can it be constructed from this record? The accused OSHIMA does not rely solely upon the immunity which international law provides for his official acts, but emphasizes this privilege as an additional release from any personal responsibility to be attached to his ambassadorial functions.

The duties of an ambassador are so well described and their field so circumscribed by long usage, custom and the necessities of the assignment that the term "agent" truly describes the role. Discretion and use of moral choice are uncalled for, they have no place. Human personalities and individual responsibility are beyond the field, when nations deal with each other. Nations deal through the heads of their states and the foreign ministers are the organs for communication, the ambassador, the conduit. Resignation, recall and dismissal of agents are prerogatives exercised extensively during recent years.

Analyzing German-Japanese relations we find ten agreements, none of which were negotiated or signed by the accused OSHIMA until after their approval in Tokyo and instructions received. Performing the administrative task of signing agreements which were within the ordinary course of diplomatic procedure cannot be

considered proof for any of the charges contained in the Indictment. To predicate a conspiracy charge upon an agreement with Germany is contradictory in itself. Looking at the alleged cooperation it resolves itself into three main demands:

(1) Germany wished Japan to go against England, Japan refused at a time when the war was going hard for the British Empire.

(2) Germany urged Japan to go against Soviet Russia when Hitler's army was marching towards Moscow, and later; this Japan refused to do.

(3) The foreign policy of Germany was directed in the crucial period towards keeping the United States out of the European War.

Japan was unable to comply with all three demands. There was no effective cooperation between Germany and Japan. The accused is charged with creating a situation which did not in reality exist.

His presence in Germany from 1934-39 and again from 1941 until 1945, the time during which most of the acts complained of were being committed in Japan and in occupied areas in the Far East, places the accused in a position far remote from the internal operations which were deciding peace or war for Japan. Lack of communication, strained conditions in international

relations specially limited the opportunity of the accused OSHIMA to participate in any organization or governmental program, and any acts which the accused OSHIMA committed were those initiated in Tokyo.

No instructions, orders or directives could be issued by the accused OSHIMA by the nature of his assignment. It should be noted that the United States of America carried on diplomatic relations with Germany until war was declared.

9. With the close control which a foreign minister exercises over the ambassador and the limited scope of operation allowed, it is inconceivable that one in such a position could be accused so generally as the charges embrace. With the distance involved, the probability of interception of messages, the lack of confidence among nations, and the delicate situation throughout the world the Japanese ambassador in Germany was out of touch with conditions at home far more than the average Diet member or Japanese citizen. He received only that information which the governmental leaders chose to impart to him and the further information obtained from the press and radio. His field of activity was too limited to permit him to commit the offenses with which he is charged.

In all of the opening statements, the prosecutors

in explaining their theory of the case, have emphasized throughout, the importance of government posts which determine policy and the official position of the accused, who occupied them. On this basis alone the accused OSHIMA was beyond the scope of this inquiry. If the decision war or peace was critical, if the determination of the Japanese foreign policy was decisive, if the ability to direct or order action of any kind is a material element of the case, then this link of the chain of evidence is most conspicuous in its absence so far as the accused OSHIMA is concerned. He was never a policy maker, military commander, Minister of State, or head of a department. His role was purely administrative, perfunctory, prescribed by the law of his own country and through restraints imposed by international law.

Since the people of Japan could not go in a body to Germany, or any other country in the world, to express friendship or desire for cooperation, they must of necessity send their representative. The presence of the head of the state and also the foreign minister is most desirable at home, therefore, there was selected "an agent" who was given instructions and messages to deliver in the name of all of the people. The will of the nation is expressed in the policies of the government translated through official communications, treaties and agreements through the ambassador who is a symbol of his country. The whole nation is bound by what he does. We cannot associate official personality with the individual.

All of the agreements, treaties, commitments made to Germany were directed by the Japanese government through its established governmental channels. This is without question. Not one illegal agreement has been suggested, each nation is the sole judge as to what extent it will carry out intercourse with other sovereign powers. The brief of the evidence under this point shows forcefully how the two nations carried on their relations since World War No. I. It proves conclusively that the accused OSHIMA did only as directed. His country could not have been bound

otherwise.

Although no case appears in the record of courts of any land convicting the ambassador for any offense committed during his tour of duty -- that I have been able to discover; I had better insert that -- or while he was engaged as a diplomat, international law books and treatises abound with authority showing release and exoneration from blame and dismissal of charges without trial. Courts are ordinarily held to be without jurisdiction to try offenses committed by ambassadors. In the United States, cases involving ambassadors are held exclusively to the United States Supreme Court, but Federal procedure prohibits prosecution of foreign ministers. Expediency and necessity have been the keynote of the development to the immunity of ambassadors.

All civilized nations recognize their right to perform their duties unrestrained, subject only to the limitations imposed and instructions from their homeland. International law has been the champion and their protector. All the authorities and legal scholars sanction this principle.

To contend that an ambassador residing in Germany thousands of miles away from the scene of the Pacific war, secluded from communication with his

country except through the courtesy of Russia, Switzerland and other neutrals, could commit any of the offenses charged under crimes against humanity, or the rules of land warfare, is fantastic.

It is not to be seriously considered that conspiracy to commit this class of offenses described in Counts 53 to 55 was contemplated by the amended Charter, or that the accused OSHIMA is deemed responsible for the commission of any such offenses personally or by remote control. His position, mission and location all negative any connection with these offenses.

To charge and attempt to sustain by proof that an ambassador who is the representative of one country to the government of another has violated international law, treaties and assurances requires a complete reversal of action. Can a legislator be guilty of violating a law by attempting to change or alter it in his official capacity, at the instance of his constituent? Does the executive make himself criminally responsible for error in judgment or is that for the voters, parliament or the senate in impeachment to determine, solely as a political question?

Is international law for individuals, states, or both? One is the subject, the other is the object.

Public international law is for the state, private international law, for individuals. .Only the latter concerns itself with crimes. The issue is being confused; we are attempting to apply the law of states to individual conduct. This not only leads to confusion but is contrary to the purpose and intent of international law itself. Theorists and acadamicians may temporarily have their day in advocating such extensions, but judges and practitioners must show the fallacy of this erroneous premise.

If the framers of the amended Charter had contemplated making ambassadors responsible as public officials and as authors of war, this fact would have been expressly stated. It is assumed that the authors of the amended Charter and the Potsdam Agreement knew of the existence of immunity for they were enjoying the privilege themselves while they were meeting.

Since the amended Charter says "OF ITSELF" in Article 6, it must have contemplated that certain offices would be beyond the reach of the Charter as amended. It cannot be imagined that ambassadors are classed with governmental leaders, mere politicians who make decisions and policy. Ambassadors are presumed to be above party politics and represent the sovereignty.

CONCLUSION

So long as nations must act through their duly appointed representatives, whether it be League of Nations, United Nations, or private consuls of two or more countries, there must be some freedom of expression on the part of the plenipotentiaries, as of necessity the governments of the world must speak through their duly constituted emissaries. If the ambassador or the minister is to bind his country and to express the view of his nation manifested through the organized machinery, he must also be vested with some qualities and characteristics of the sovereignty and his right to speak must be respected and held inviolate.

The Von Papen acquittal indicates that the International Military Tribunal charter employed in Nuernberg was directed toward policy makers primarily. As the court there indicated, it in nowise intended to reach beyond and punish the mere spokesmen. There is a principle of international law involved there which grants immunity and impunity to the sovereign's representative. If the nations of tomorrow wish to maintain the integrity of expression and rely upon the word of the ambassador as expressive of the policy of the nation he represents, then this principle must

be followed to the letter. There is no doubt that the law of the future will assume what it so well established in the law of the past: that the ambassador must have freedom from the ordinary consequences of his acts.

THE PRESIDENT: Mr. Freeman.

MR. FREEMAN: If the Tribunal please, comes now the accused SATO, Kenryo and at the close of the prosecution's case and moves the Court to dismiss each and every count against him in said Indictment contained for the reason that the evidence is insufficient to sustain the charges.

For the purpose of this brief discussion relative to the failure of the prosecution to discharge its burden of sustaining the counts of the Indictment against the accused SATO, Kenryo, we will accept the general divisions named in the Indictment and treat the counts under three classifications:

1. Crimes Against Peace.

2. Murder.

3. Conventional War Crimes and Crimes Against Humanity.

I. CRIMES AGAINST PEACE (Counts 1 - 36)

Since it would be little more than repetitious to describe the contents of these counts and those to

follow under the other two groupings, it will suffice to say they deal with the alleged conspiracy or common plan to wage, plan, prepare and initiate wars of aggression as well as the acts which tend to compose the alleged conspiracy. This accused is not charged in counts 18, 19, 23, 25, 26, 33, 35 and 36.

To intelligently discuss this matter, it becomes necessary not only to determine the theory behind the alleged conspiracy charges but to rationally treat this subject in the light of logical reasoning. Certainly the application of the broadest concept of conspiracy law might well include a charge against every citizen of Japan who did not openly work contrary to the governmental policies during the period alleged in the Indictment.

The prosecution cannot intend this. Such would be fantastic for there would be neither time nor personnel enough to complete the task of trying those involved in the war effort. Therefore, reason would dictate that the gist of the alleged conspiracy accusations comprises as its objective the accusation of those high governmental figures who possessed sufficient power and influence to actually formulate the policies of the country.

My colleagues have discussed the question of

conspiracy and the substantive law applying thereto. We do not propose to elaborate further but to now point out, from the prosecution's evidence and the failure of the prosecution's evidence, why the accused SATO, Kenryo cannot by any stretch of reasoning be judged guilty of complicity herein.

Prosecution exhibit 122 is a brief biography of the positions held by the accused during his military career. It reveals that he was a military man by vocation. Fifty days, or less than two months, prior to the commencement of hostilities December 7, 1941 this accused held only the rank of colonel. On October 15, 1941 he was promoted to the rank of "Shosho" which is perhaps comparable to Brigadier General and is the lowest ranking general in the Japanese Army.

Certainly then, up to this date the accused occupied such a minor role in the governmental and military affairs of Japan that he cannot with seriousness be held accountable as a participant in the formulation of even minor governmental policies -- not to mention such a momentous decision as war. The very nature of his position makes it physically impossible for him to have done so unless the criterion be so broad as to encompass, as said before, the actions

of many thousands, if not millions, of Japanese people.

The evidence recites further that on November 15, 1941 -- and this date is subject to correction because the record varies as to the month -- just twenty-three days prior to the attack on Pearl Harbor, this accused was ordered to assume charge of the Military Affairs Section of the Military Affairs Bureau under the jurisdiction of the War Ministry. The Tribunal should bear in mind that this was merely a section under a Bureau of the War Ministry. The evidence fails to show that this position carried with it any duty of such a nature as could possibly involve the accused in the charges contained under this group of the Indictment. Moreover, there is a total failure of proof that the assumption of an administrative military assignment under orders is, in and of itself, a criminal act.

Prosecution evidence reveals that not even the chiefs of bureaus under the War Ministry had authority to make decisions on official documents sent to the War Ministry. And certainly a section head under such a bureau would be in a much lesser position of authority. (Record page 14377).

Prosecution evidence further shows that prior to April 20, 1942, at which time the accused SATO

succeeded to the office of Chief of the Military Affairs Bureau, he was not even qualified to attend the conferences of bureau chiefs. The effect of this is obvious. How can he be successfully charged with the planning, preparing or initiating of wars of aggression or any other acts stated in these counts when a necessary corollary is the ability to participate by virtue of the office or influence held.

Having thus shown the Tribunal, by the evidence presented, that up to the period of commencement of hostilities December 7, 1941 this accused possessed neither the rank nor occupied any position or influence wherein or whereby he could participate in, control, command or authorize the initiating, planning or waging of war of aggression, we move to the next group.

II. MURDER (Counts 37 - 52).

Encompassed under this group are counts charging the initiation by Japan of hostilities between June 1, 1940 and December 8, 1941 and subjecting the accused to liability for the crime of murder. This accused is omitted from Counts 45, 46, 47 relative to certain cities in China, together with Counts 51 and 52 pertaining to the U. S. S. R.

What does the evidence show to sustain these charges against this accused. At the risk of the patience of the Tribunal, we reiterate that the accused SATO was without the means to qualify as to those charges.

The record of various meetings where at the grave and weighty matters which were to guide the destiny of Japan were decided do not include the name of SATO, Kenryo as one present nor does the prosecution offer even a scintilla of evidence that he was a participant, leader, organizer, instigator or accomplice in the matters herein alleged.

Whether or not the charge of murder can successfully be applied to the act of destroying human lives upon the commencement of war is a matter which has been treated in the general argument and will not be further discussed here.

The accused's advancement to the position of Chief of the Military Affairs Bureau dates as of April 20, 1942 and will be considered in the following group.

III. CONVENTIONAL WAR CRIMES AND CRIMES AGAINST HUMANITY (Counts 53 - 55).

The prosecution has consumed a larger portion of its time under these counts in dealing with the commission of the individual acts which compose the alleged war crimes against humanity. The legally all-important proposition of connecting such alleged acts with the responsibility of this accused has failed of proof and the evidence offered therefore is of a weak and varying nature which cannot but be considered a complete failure of proof in this regard.

The heartbeat of the prosecution's case against this accused is that he, as Chief of the Military Affairs Bureau commencing April 20, 1942 as aforesaid, was in charge of the Prisoner of War Bureaus. This allegation of the prosecution has not been substantiated by the evidence offered but in fact has been disproven by their own witnesses and documents.

Exhibit 92 describes the set-up and origin

of the Prisoner of War Internment Camp and Prisoner of War Information Bureaus. The Tribunal should take particular note of the use of the word "bureaus." In this document are contained the words and I quote: "The Prisoner of War Information Bureau shall be under the jurisdiction of the Minister of War." A like statement is contained in reference to the Prisoner of War Internment Camps. They were thereby given the rank and dignity of bureaus and so designated as such.

The witness TANAKA on page 14,346 said: "There is no bureau in War Ministry which is under the control of the Military Affairs Bureau. They are all under the jurisdiction and control of the Minister of War. The Prisoner of War Information Bureau is a special existence in Japan and is under the control of the Minister of War."

In connection with this line of thought, the Tribunal should carefully note the testimony of the witness TANAKA that UEMURA as Chief of the Prisoner of War Bureaus was a Lieutenant General and superior in rank to this accused. Therefore, the proof before the Tribunal as to the relationship between the Military Affairs Bureau and the Prisoner of War Bureaus can well be expressed in the words

of their own witness TANAKA (Record 14,404). "The Prisoner of War Information Bureau was established as an outside bureau attached to the War Ministry."

The evidence further shows the needs of the commanders of Prisoner of War Camps were communicated directly to the Prisoner of War Information Bureau where the matters pertaining to the Prisoners of War were disposed of.

Prosecution relied upon the testimony of witness SUZUKI to show that protests relative to treatment of prisoners of war delivered by the Swiss Legation to the Japanese Government were connected with the accused SATO. Their attempt has been highly unsuccessful for the evidence reveals time and time again that the duties pertaining to the handling of prisoners were in the hands of the two bureaus known as the Prisoner of War Information Bureau and the Prisoner of War Administration and/ or Control Bureau; that the protests were sent directly to them.

The witness is of the opinion that copies may have been sent to the other bureaus (Record Page 15526) but this, in and of itself, does not put the accused SATO in a position dissimilar to that of any of the Bureau Chiefs.

The burden is on the prosecution to prove these things and their failure to do so cannot be supplied by implication or innuendo. The evidence should be clear and concise. But by whatever rule the Tribunal wishes to apply in judging the sufficiency of the evidence it is demonstrated that in regard to the accused SATO a conviction cannot be sustained by the evidence presented.

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The witness TANAKA has admitted that he was in

charge of the Military Service Bureau of the War Ministry and that friction existed between his bureau and the Military Affairs Bureau. Therefore the Tribunal should take into consideration the possibility of biased testimony on the part of this witness which may be retaliatory in a sense. (Record Page 14343).

It has not been the purpose of counsel to take each count separately for the reason that it would be tiresome and repetitious to state and restate simply that there has been a failure of proof. Therefore this accused incorporates the arguments heretofore made by counsel in reference to general matters and statements pertaining to law relative to the Indictment.

Relying upon the Tribunal at this time, at the close of the prosecution's evidence, to weight the value and nature of the evidence offered, and to note the lack of evidence, in reference to each and every count the accused SATO renews his motion that the Indictment be dismissed and requests that he be not required to go forward with evidence in his behalf.

MR. BLAKENEY: May it please the Tribunal --

THE PRESIDENT: Which are you taking, Major?

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MR. BLAKENEY: May it please the Tribunal --

THE PRESIDENT: Which are you taking, Major?

MR. BLAKENEY: In the absence of Mr. Furness, I have been asked to read the motion on behalf of SHIGEMITSU, Mamoru.

THE PRESIDENT: I think it will be convenient to have the recess now. We will recess for fifteen minutes.

(Whereupon, at 1440, a recess was taken until 1500, after which the proceedings were resumed as follows):

MARSHAL OF THE COURT: The International Military Tribunal for the Far East is now resumed.

THE PRESIDENT: Major Blakeney.

MR. BLAKENEY: Now comes the defendant SHIGEMITSU, Mamoru, and moves the Tribunal to dismiss the Indictment and the several counts thereof in so far as they relate to him upon the ground that the evidence adduced by the prosecution is insufficient to warrant a conviction upon any of the counts charged by the Indictment.

In moving the Tribunal for the defendant SHIGEMITSU to dismiss the Indictment, we invite the attention of the Tribunal to the evidence adduced by the prosecution against the defendant, which we very briefly analyze under the following headings:

(1) Sino-Japanese Relations

(2) The Pacific War

(3) Japanese-German-Italian Relations

(4) Soviet-Japanese Relations

(5) Conventional War Crimes

To shorten the argument, the citations of pages of the record pertinent to the various points will not be read.

(1) Sino-Japanese Relations.

The defendant SHIGEMITSU is indicted in

Counts 1, 2 and 3 for conspiracy to dominate respectively Eastern Asia, Manchuria, and China; in Count 6 for planning and preparing war; and in Counts 18 and 27 for waging war against China. No evidence has been adduced by the prosecution to establish any responsibility of his of whatever kind on these charges. Not only that, but all the witnesses produced by the prosecution for testimony pertinent to this point have testified affirmatively to his efforts and his fruitful services toward peace between China and Japan.

Moreover, abundant evidence offered by the prosecution has clarified the fact that the Manchurian Incident occurred without desire or intention on the part of the Japanese Government -- or, rather, occurred against its intention. See, for instance, the testimony of the witnesses SHIDEHARA, the then Foreign Minister; WAKATSUKI, then Premier; TANAKA, ex-Director of the Military Service Bureau; MORISHIMA, et al. The defendant SHIGEMITSU, the evidence discloses, had nothing to do with the outbreak of such incident.

Baron SHIDEHARA, Foreign Minister at the time of the Manchuria Incident, has also testified to the facts that SHIGEMITSU was a faithful apostle of "SHIDEHARA diplomacy"; that he himself recommended

appointment of the defendant as Minister to China; that the appointment took place during his tenure of office as Foreign Minister; that the defendant spared no effort to relax the tension then prevailing between China and Japan; and that strenuous efforts were made by the defendant, after the outbreak of the incident in Manchuria, toward a peaceful solution of the conflict. Also the testimony of the witness MORISHIMA, Consul at Mukden, Manchuria, at the time of the Manchurian Incident, is as clear on these points. The witness Powell has testified to the fact that SHIGEMITSU, after the unfortunate outbreak of hostilities around Shanghai, succeeded by dint of his untiring efforts in concluding the Agreement for Cessation of Hostilities on 5 May 1932.

Attention is now invited to the facts that the defendant SHIGEMITSU is not indicted in Count 19 for initiating war against China on or about 7 July 1937, and that, though Count 28 charges him with waging war against China, he was neither in Tokyo nor in China at the time when those hostilities occurred between China and Japan, but was in Europe as ambassador until the hostilities in China had reached a much advanced stage (Cabinet Secretariat curriculum vitae, exhibit 123. It may be also noted in this connection

that one page -- covering the period of five years from 1930 to 1934 -- is evidently missing from this personnel record.)

This defendant is indicted also on Counts 48, 49 and 50 for slaughtering the inhabitants of the cities of Changsha, Hengyang, Kweilin and Liuchow. The statement above applies also to these charges, and no evidence can be said to have been adduced to connect him with such murders.

(2) The Pacific War.

The defendant SHIGEMITSU is charged, in Counts 4 and 7 to 16, with the conspiracy for and the planning and preparation of the war against the United States of America and nine other nations. But the fact is that the war had been begun before he was appointed Minister for Foreign Affairs on 20 April 1943; and of course before he was concurrently appointed Minister for Greater East Asia on 22 July 1944. He was at his posts abroad not only before but after the outbreak of the war. Exhibit 123 shows that:

(a) The war against the United States, the British Commonwealth, the Philippines and the Netherlands started about sixteen months before his appointment as Foreign Minister, and about two years and seven months before he became Minister for Greater East Asia;

(b) The advance of the Japanese Army into French Indo-China was completed about three years before the defendant SHIGEMITSU was made Minister for Greater East Asia (retaining his portfolio as Foreign Minister). In this respect, it has been made clear in the opening statement on this phase that the Japanese Army moved into northern French Indo-China on 22 September 1940, and into southern French Indo-China on 28 July 1941, and that Japan was, from that moment onward, the master of Indo-China. As Mr. SHIGEMITSU was not in Tokyo at that time (exhibit 123), he did not participate in governmental conferences in 1941 concerning that occupation, nor had he any knowledge of the negotiations which were conducted exclusively by a very limited number of people in unnter secrecy in Tokyo, Vichy and Hanoi. It is only natural that the prosecution did not mention in court the name of the defendant as one of those who occupied positions of authority in regard to matters concerning French Indo-China.

On the other hand, the French National Committee of de Gaulle declared war on Japan on 8 December 1941; that is, two years and seven months before the defendant took office as Minister for Greater East Asia;

(c) The same facts as in paragraph (a) apply to the war against Thailand.

Not only, therefore, has no evidence been tendered by the prosecution to sustain the charges against the defendant SHIGEMITSU of conspiracy for and the planning and preparation of the above-mentioned wars; but all the evidence, through the exhibits cited above, demonstrates the contrary; that is, that he had nothing whatever to do with these wars.

The statement under this heading will apply also to Count 23 for initiating war against France, and Counts 29 to 34 for waging war against the United States, the British Commonwealth, China, France, the Philippines and the Netherlands, with which the defendant is not indicted on Counts 19, 20, 21, 22 and 24, for the initiation of the aforesaid wars.

(3) Japanese-German-Italian Relations.

This is Count 5. During the time when the negotiations on the Anti-Comintern Pact were being conducted, the defendant SHIGEMITSU was on the reserve list of the Foreign Office (exhibit 123).

When later the negotiations on the Tripartite Pact were going on, he was ambassador to the Court of St. James (exhibit 123), and innumerable evidentiary documents of the prosecution have proven that the

negotiations were expedited mainly in Tokyo by a very small number of people, in complete secrecy. These facts reinforce the inference from his failure to be mentioned in this connection to indicate that this defendant had no connection with either of these pacts, or with the alleged three-power conspiracy.

(4) Soviet-Japanese Relations.

As for Counts 17 and 35 -- initiating and waging war against the Union of Soviet Socialist Republics -- the defendant, as a career diplomat, was ambassador in the U.S.S.R. at the time of the Lake Khasan Incident mentioned in Count 35 (exhibit 123). Whatever he said during the negotiations in 1938 was all within the scope of the instructions he received from his home government (exhibit 754, extract from the record of the Talk of Litvinov and SHIGEMITSU on 20 July 1938, in Moscow, concerning Khasan Lake), and no evidence has been adduced by the prosecution to establish that the Tokyo government had any idea of initiating or waging war against the U.S.S.R. In executing the instructions mentioned above, the defendant made no slightest pretention of demanding cession of Soviet territory by demarcating the border between the U.S.S.R. and Manchukuo, as it was contended without proof in the opening statement

of the Russian prosecutor. On the contrary, the record of the Talk of Litvinov and SHIGEMITSU (exhibit 754) testifies to the facts that what the defendant wished was that the border should be accurately demarcated, not on the basis of the data of Manchukuo alone, but that the data of both parties should be consulted, and that the first and foremost concern of the defendant in these negotiations was tranquility on the Soviet-Manchukuoan border in the region of Lake Khasan. And thus agreement was reached between Commissar Litvinov and Ambassador SHIGEMITSU on the border clash of 1938.(exhibit 273). The prosecution has in this way tendered evidence that the defendant made a valuable contribution to peace between the two nations; the charge that he initiated war against the U.S.S.R. is sustained by no evidence.

This defendant is also indicted in Count 52 for murder in the affair of Lake Khasan. The statement above under the present heading applies a fortiori to this point; and not even the slightest evidence which might connect the defendant with any such murder has been tendered by the prosecution.

(5) Conventional War Crimes.

Mr. SHIGEMITSU is indicted in Counts 53, 54 and 55 for conventional war crimes. As far as the

defendant is concerned, we understand that he is directly charged with matters regarding the treatment and administration of prisoners of war and civilian internees, as well as murder of such and similar persons. The Minister for Foreign Affairs, which post the defendant assumed well after the commencement of the war, had no competence or responsibility for prisoners and civilian internees. His sole competence in this respect was to transmit to appropriate Japanese authorities documents received on this matter from foreign governments, and to inform those foreign governments of replies from such authorities when he was furnished with them. The opening statement of the prosecution for this phase admitted that such was the competence of the Minister for Foreign Affairs, and this fact has been established by the evidence of TANAKA, Ryukichi, ex-Director of the Military Service Bureau, and SUZUKI, Tadakatsu, during the war Chief of the Bureau for Affairs of Japanese Residents in Enemy Countries, witnesses introduced by the prosecution.

Abundant proof as to who the competent authorities on this matter were may be found in numerous evidentiary documents tendered by the prosecution -- for example, exhibit 1965-A, containing the regulations

concerning the Prisoners of War Information Bureau and prisoners of war camps, ordinances and orders issued by the Minister of War concerning the treatment, supplying, employment for labor of prisoners of war, etc. That the Minister for Foreign Affairs had no competence in regard to prisoners of war and similar persons, nor any organization to conduct investigation concerning protests from foreign governments, may be found stated in the testimony of TANAKA and SUZUKI.

The foregoing statement applies of course to the employment of prisoners of war for the construction of the Burma-Thailand Railway and to the Bataan Death March. Especially it has been clarified, as to the former, by a prosecution document, exhibit 475, Report of the War Ministry, and the affidavit of the witness WAKAMATSU, ex-Lieutenant General (exhibit 1989), that the employment of prisoners of war was based upon a decision of the Imperial General Headquarters; and further as to the latter, by exhibit 1980-E, it appears not only that it occurred before the inauguration of the defendant SHIGEMITSU as Minister for Foreign Affairs, but that even the accused TOJO, the then Minister for War, had no knowledge of the matter. In brief, no evidence has been adduced to prove the responsibility of the defendant on these counts. And

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not only that, but the evidence tendered by the prosecution has clearly shown that this defendant had no connection with the matter.

It may be interesting to note that, although the Foreign Ministry had no competence or responsibility whatever for the treatment or administration of prisoners of war, evidence by the witness SUZUKI has made it clear that the Foreign Ministry did its best to secure amelioration by the competent authorities of the conditions of the prisoners of war.

It is also to be noted that SHIGEMITSU is indicted in Count 44, that is, murder of prisoners of war, civilian internees, and similar persons. What has been said above under this heading will prove the defendant's lack of responsibility for any such murder.

Conclusion.

By this very brief analysis of the evidence we are led to believe that no sufficient evidence has been adduced by the prosecution to warrant a conviction upon any of the counts charged by the indictment against the defendant SHIGEMITSU, and we submit that those parts of the indictment pertaining to this defendant should be stricken and the defendant discharged.

THE PRESIDENT: Mr. McDermott.

MR. McDERMOTT: Mr. President, and Members of the Tribunal:

Comes now the accused SHIMADA, Shigetaro, and at the close of the prosecution's case moves the Court to dismiss each and every count in said Indictment contained for the reason that the evidence is insufficient to sustain a verdict of guilty against him.

The prosecution evidence has shown that the accused SHIMADA, Shigetaro, became Minister of the Japanese Navy and a cabinet member only fifty days prior to the commencement of hostilities, December 7, 1941. The evidence further has shown that the planning and preparing of the Pearl Harbor attack, as well as the other phases of the commencement of hostilities, was under the exclusive control and preparation of the Chief of Naval General Staff. The Indictment alleges that SHIMADA attended only three conferences relative to deciding on the policy of war, and the proof does not sustain his attendance at these.

Prosecution evidence further reveals (document 7512, exhibit 124) that immediately prior to his appointment as Navy Minister the accused SHIMADA served only as the Commander of the Yokosuka Naval

Station and was not in a command position sufficient in any sense to engage in a common plan or alleged conspiracy to commit any of the acts set forth in this Indictment. It is clearly indicated that practically all of the naval career of this accused was spent as a man of the sea and that he was not such an officer as did participate in policy formation.

At the time of the entry of this accused into the Cabinet as Minister of Navy, prosecution evidence has shown that the situation between the United States and Japan was so tense that the possibility of war had ceased to exist and in its place the probability of war had succeeded. The prosecution has failed to show that this accused either encouraged the outbreak of war or could have prevented it in any way, and in fact, it is apparent that the pattern of war had clearly been cut prior to his assumption of duties.

The evidence of the prosecution's main witness against the Japanese naval accused on trial here was that of Admiral J.O. Richardson of the United States. And his testimony, full of inconsistencies and incorrect statements, did not affect this accused in any way, but in fact exonerated him of many of the counts in this Indictment for the reason that it was shown that the entire naval strategic operational plans, known as General Order Number One, had been originated and prepated prior to the time this accused assumed office and were carried out under the direction of the Naval General Staff and not the Navy Ministry.

Prosecution has further shown that it was

the customary practice of all nations for high-ranking and senior naval officers to succeed to the higher positions in the naval department and they have failed to show that the assumption of such a post is criminal in and of itself.

A distinction must be drawn between the Naval Department and others because in a sense the procedure of accepting an assignment to a position is more in the nature of a duty or obligation and not an individual matter of choice.

Prosecution evidence clearly indicates a split in naval thought as to even the possibility of successful outcome of war with the United States and has even shown that the Chief of Naval General Staff advised the Emperor to this effect. The evidence shows that Admiral OIKAWA, Minister of Navy under the KONOYE Cabinet, resigned because of the general over-all issue of war or no war. How then could a conspiracy exist with the multitude of divergent thoughts that then existed?

In reference to the counts under Group 3 entitled "Conventional War Crimes and Crimes Against Humanity," prosecution has failed to show that this accused either ordered, consented or had knowledge of or gave permission to any of the commanders of

the navy to commit any of the alleged acts or atrocities complained of. The impossibility of controlling the spontaneous actions of all naval commanders, thousands of miles from the Navy Ministry, is self evident.

The Court should take particular notice that the prisoner of war camps were largely under the control of army personnel and not naval. And that the misconduct set forth in the Indictment in reference to the Japanese Navy in this regard has been unsustained by the evidence presented. A distinction exists between spontaneous acts committed on the battlefront and the housing and keeping of prisoners of war far removed from those areas.

Therefore, for the reasons stated herein, the accused SHIMADA respectfully requests this Tribunal to dismiss each and every count of the Indictment as heretofore stated and to at this time weigh the entire evidence of the prosecution to the end that it be discovered that the matters herein shown constitute a complete failure of proof of the charges so stated.

Thank you, Mr. President.

THE PRESIDENT: Mr. Caudle.

MR. CAUDLE: If the Tribunal please: Now

comes SHIRATORI, Toshio, through counsel and makes and enters a formal motion to dismiss each and every count of the Indictment heretofore filed in this matter as pertains the said defendant SHIRATORI, and in support of said motion submits the following facts and contentions:

GROUP ONE -- "Crimes Against Peace"

With reference to Counts 1 to 4, the defendant SHIRATORI was, during the time such offenses were alleged to have taken place, a career diplomat serving in the Foreign Office of Japan and had no activity whatsoever relative to these counts. The highest position held by him during that part of the period to June 1933 was Chief of the Information Bureau of the Foreign Ministry under Baron SHIDEHARA, then Foreign Minister, in which position he exercised a conciliatory attitude and, according to Baron SHIDEHARA's own testimony (page 1356 of the record dated 25 June 1946) as a prosecution witness, cooperated in every respect with the Baron in an effort to stop all forms of military aggression.

Inasmuch as these counts cover from January 1, 1928 to September 2, 1945, it will of necessity require later reference to various dates and the

corresponding activities of the accused during this period in later parts of this motion. Inasmuch as the defendant had no connection whatsoever with the charges contained in said Counts 1 to 4, the same should be dismissed.

Count 5 relating to world domination by the Tri-Partite Pact and the planning and conspiracy thereof, will be discussed later in this motion.

Count 6 should be dismissed on the grounds set forth covering Counts 1 to 4.

With reference to Counts 7 to 17, it is called to the attention of the Tribunal that in prosecution exhibit 125, it is shown that the accused was relieved as a diplomatic adviser in the Foreign Office at his own request on July 22, 1941 and thereafter was never again connected with the Foreign Office or with the government. That is to say, inasmuch as he had no part in the government after July 22, 1941 and the alleged offenses occurred December 7, 1941 and thereafter, said Counts 7 to 17 should be dismissed.

With reference to Counts 18 to 26, the alleged charges are contained in said counts against specific defendants which group does not contain the name of the defendant SHIRATORI, and

it is assumed that in view of this condition, said counts do not in any way involve the accused SHIRATORI. However, for the sake of clarity, it is requested that his status in this regard be officially recognized by the Tribunal.

With reference to Count 27, that part of the same relating to waging aggressive war between September 18, 1931 and September 2, 1945 against the Republic of China should be dismissed for the reason set forth covering Counts 1 to 4.

With reference to Count 28, the same should be stricken from the Indictment in that this count is covered by Count 27 and is only repititious.

With reference to Counts 29 to 32, the same should be dismissed on the grounds set forth covering Counts 7 to 17.

With reference to Count 33, inasmuch as said count charges specific individuals among which the name of the accused SHIRATORI does not appear, it is assumed that the Tribunal will not consider this count as pertains to said accused. However, it is requested that the Tribunal take official cognizance of this circumstance.

Count 34 should be dismissed on the grounds set forth covering Counts 7 to 17.

Count 35 should be dismissed on the grounds that from April 1937 until September 1928 the accused was on the waiting list at the Foreign Office and had nothing whatsoever to do with governmental operations as shown in prosecution exhibit 125, and further that said count designates specific persons among which the accused SHIRATORI does not appear.

Count 36 should be dismissed due to the fact that at the time of the alleged offense contained in said count, the same being the summer of 1939, the accused was in Italy as shown by prosecution exhibit 125, and further that said count designates specific persons among which the accused SHIRATORI does not appear.

GROUP TWO -- "Murder"

Counts 37 and 38 should be dismissed in that said counts contained charges alleging offenses by specific individuals among whom the name of the accused SHIRATORI does not appear and further, being a career diplomat, had nothing whatsoever to do with the alleged atrocities contained in said counts.

Counts 39 to 43 should be dismissed on the grounds set forth covering Counts 7 to 18 and Counts 37 and 38.

With reference to Count 44, the same should

be dismissed on the ground that the defendant was a diplomat and had no connections or functions of a military nature whatsoever, and at no time advocated or became a part of any conspiracies to murder prisoners of war, or crews of ships destroyed by Japanese forces, or any other such alleged charge as contained in said count, and there has been absolutely no evidence whatsoever introduced to connect said accused with such atrocities.

With reference to Counts 45 to 52, the alleged charges are contained in said counts against specific defendants, which group does not contain the name of the defendant SHIRATORI, and it is assumed that in view of this condition said counts do not in any way involve the accused SHIRATORI. However, for the sake of clarity, it is requested that his status in this regard be officially recognized by the Tribunal.

GROUP THREE -- "Conventional War Crimes and Crimes Against Humanity"

With reference to Count 53 to 55, it is brought to the special attention of the Tribunal that there are specific persons named in said counts among which the name of the accused SHIRATORI does not appear, and further that these counts come

within the province of grounds for dismissal as set forth herein covering Counts 7 to 17.

The accused through counsel has substantiated the motions covering all counts with the exception of Count 5 relating to a general plan of conspiracy between Germany, Italy and Japan. Said accused asks that this count be dismissed, and in setting forth the grounds for such dismissal, it will be necessary to relate not only his activities while Ambassador to Italy, but also to give a brief resume' of the action of the accused prior to and after such service as Ambassador to Italy and set forth predominant facts that exist relative to exhibits heretofore introduced in evidence by the prosecution relating to the accused's activities in this regard:

Prosecution exhibit 125 shows that on June 2, 1933, the accused was appointed Minister to Sweden and that on June 28, 1933 he was assigned to similar service in Norway, Denmark and Finland; that he continued in this capacity until April 28, 1937 when at which time he was relieved of this assignment; that thereafter from April 28, 1937 to September 22, 1938 the accused was placed on the waiting list with no duties whatsoever; that on September 22, 1938 the accused was appointed

Ambassador to Italy by UGAKI, Kazushige, the then Foreign Minister. However, before his arrival in Rome, USAKI resigned as Foreign Minister and ARITA, Hachiro replaced him in this position; that the accused did not arrive in Rome until December 29, 1938, and immediately thereafter the entire Cabinet fell on January 3, 1939 with HIRANUMA replacing Prince KONOYE as Premier. So in view of these facts, that is to say, a new government having been set up after his appointment, of which the Court has ample evidence, it is impossible to believe or even consider that the accused was appointed Ambassador to Italy for the sole purpose of promoting and concluding the Tri-Partite Pact as alleged by the prosecution.

In various excerpts from CIANO's diary as submitted by the prosecution, being prosecution exhibits 499-A and 501, the prosecution endeavors to show that the accused was attempting to conclude said pact. Exhibit 499-A is dated January 7, 1939, and inasmuch as the Cabinet fell on January 3, 1939, it cannot be successfully concluded that the accused had any idea whatsoever of the attitude of the new government as pertains this pact. Consequently this exhibit or evidence should be concluded to be

without any basis of foundation. As to exhibit 501, another excerpt from CIANO's diary, it should be concluded that CIANO was unfamiliar with SHIRATORI's attitude or functions and, consequently, spoke whereof he knew not, inasmuch as in the middle of the second paragraph on the entry of March 8, 1939 CIANO writes as follows: "OSHIMA and SHIRATORI have refused to communicate through official channels. They ask Tokyo to accept the pact of alliance without reservation, otherwise they will resign and bring about the fall of the Cabinet." The absurdity of this statement appears upon its face, and we have to this day to hear of any cabinet or government falling or even tottering upon the resignation of any ambassador.

Kapleau & Goldberg

According to Prosecution Exhibit 125, the accused SHIRATORI was ordered home from Rome September 2, 1939 and arrived in Tokyo on October 13, 1939 and that on January 9, 1940, was relieved as Ambassador to Italy. He remained in an inactive status in the nominal role of Ambassador with no assignment on one-third salary until August 28, 1940, when upon his own request he was released from this duty. On this date, according to said exhibit, he was appointed adviser in the Foreign Ministry and his activities thereafter bring us to various prosecution exhibits heretofore introduced relating to purported communications from the German Ambassador to Japan, one Eugene Ott, to the German Foreign Office. The Tribunal should bear in mind that Ott for a number of years tried to conclude an alliance between the German Government and the Government of Japan, and remained as Ambassador over a period of several years. During this time, he sent glowing and enthusiastic communications to his Government describing the progress he was making, and in a number of instances mentioned the assistance he was obtaining from the accused SHIRATORI and also from time to time enumerated the power, authority, and influence that the said SHIRATORI carried, but upon

consideration of the fact that over this long period of time the said Ott was able to accomplish absolutely nothing in the way of any alliance between his Government and that of Japan, it must upon its face be concluded that the said Ott sent communications which belied the facts and distorted the truth in an effort to conceal and cover up his own shortcomings.

It is further brought to the attention of the Court that fully one year elapsed from the time SHIRATORI left Rome in September of 1939 until September 1940 when the Tri-Partite Pact was concluded between Foreign Minister MATSUOKA and the then German Special Envoy Heinrich Stahmer. It is the contention of the defense and should be the general knowledge of the Tribunal that Ambassador Heinrich Stahmer, who first came to Japan as a Special Envoy, was sent here by his Government to determine what the true facts were and indicated very strongly that after such a long period of time and after such glowing and enthusiastic reports from the said Ott, as aforesaid, with absolutely no results, the German Government was likewise cognizant of the fact that Ott had been "doctoring" his communications. As to the conclusion of said pact, we think the Tribunal

will take judicial notice of the fact that Foreign Minister MATSUOKA was a man,of strong and domineering will and did not seek or consider the advice of anyone and acted absolutely upon his own volition and that the accused, as adviser to MATSUOKA, was neither considered, required, nor otherwise used in any respect, form, or manner as an adviser of the said MATSUOKA and in his said capacity, under the circumstances, wielded no influence whatsoever on the Foreign Policy of his government. We therefore request that all communications of said Ott heretofore introduced by the Prosecution be adjudged to be not founded on facts, but to have been a ruse and a sham on the part of the said Ott to cover up his failures and shortcomings.

The Prosecution has made a great deal over various written articles and statements alleged to have been written or made by the Defendant SHIRATORI, but at no time have they introduced any evidence to show that any article or speech made by the said accused was in behalf of or formed a part of a policy of the Japanese Government. Such speeches and articles were strictly the personal opinion of the said accused and we contend that he was well within his right of exercising that prerogative guaranteed

to every man in every democratic country in this world -- that of freedom of speech and expression, and in no way has the Prosecution shown such articles or speeches to be a part of any conspiracy on the part of the said accused or that such influenced in any way the decision and policies of the Japanese Government.

It is further called to the attention of the Tribunal that throughout the entire presentation of the Prosecution's case the said Prosecution has not produced one live witness to testify against the accused SHIRATORI, nor has the Prosecution produced even one sworn statement against the said accused.

And in conclusion we wish to impress upon the Tribunal that the Defendant SHIRATORI never held but one ambassadorial post, his other activities outside of Japan being just a Minister -- and I would like to amend that to say also a secretary; and that this ambassadorial post which was served in Italy was for only a period of a little over eight months. In view of such limited service, it is impossible to conceive that he was a man of such influence and authority and of having such a great

part in the formulation and direction of the foreign policies of the Japanese Government as the Prosecution tried to lead the Tribunal to believe.

Respectfully submitted this 22nd day of January, 1947.

THE PRESIDENT: Mr. Levin.

MR. LEVIN: Mr. President and may it please the Tribunal:

With reference to the motion which I presented on behalf of Okinori KAYA yesterday, I ask that the following corrections be made:

1. In the eighth line of the first paragraph, page 1, the numeral be changed to 19, so it may read "resigning on February 19,, 1944."

2. On page 2, paragraph 2, the sixth line, the words "Count 45 relates to the Nanking attack" should be deleted.

These corrections do not change the substance of our argument

MOTION OF DEFENDANT SUZUKI, TEIICHI TO DISMISS.

Now comes the defendant SUZUKI, Teiichi, by his counsel, and moves the court to dismiss each and every one of the counts in the Indictment against him on the ground that the evidence offered

part in the formulation and direction of the foreign policies of the Japanese Government as the Prosecution tried to lead the Tribunal to believe.

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Respectfully submitted this 22nd day of January 1947.

THE PRESIDENT: Mr. Levin.

MR. LEVIN: Motion of Defendant SUZUKI, Teiichi, to Dismiss.

Now comes the defendant SUZUKI, Teiichi, by his counsel, and moves the court to dismiss each and every one of the counts in the Indictment against him on the ground that the evidence offered by the prosecution is not sufficient to warrant a conviction of this defendant.

Dated this 8th day of January, 1947.

Accompanying Memorandum in Support of Motion of Defendant SUZUKI, Teiichi, to Dismiss.

With reference to Counts 1 to 5: These counts are general counts, charging conspiracy between January 1, 1928, and September 2, 1945. The character of the official position of this accused is indicated by his personnel record, Exhibit 126. From this it must be clear beyond peradventure that this accused, being a regular army officer, on the

by the prosecution is not sufficient to warrant a conviction of this defendant.

Dated this 8th day of January, 1947.

Accompanying Memorandum in Support of Motion of Defendant SUZUKI, Teiichi, to Dismiss.

With reference to Counts 1 to 5: These counts are general counts, charging conspiracy between January 1, 1928, and September 2, 1945. The character of the official position of this accused is indicated by his personnel record, Exhibit 126. From this it must be clear beyond peradventure that this accused, being a regular army officer, on the

basis of the evidence which has been adduced, has not been shown to have participated in the conspiracy set forth in these counts.

Counts 6 to 17, inclusive, relate to the planning and preparation for a war of aggression. We make the same point with reference to these counts as we make with reference to Counts 1 to 5.

Count 19 charges the defendant, among others, with having initiated a war of aggression on or about July 7, 1937, against the Republic of China. From 1933 until November 1, 1937, the accused was a Colonel in the regular army and nothing in the evidence or the record indicates any implication on his part in regard to a war of aggression against the Republic of China.

Counts 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, and 36 charge the defendant with initiating a war of aggression against the countries specified in the various counts. It will be specifically noted that the defendant is not charged, under Count 18, as being one initiating a war of aggression against the Republic of China. For the reasons heretofore given, and the fact that the accused did not become the head of the Planning Board and a member of the Cabinet until April, 1941, it is submit-

ted that the evidence offered by the prosecution is not sufficient to warrant a conviction on these counts.

Group 2, Counts 37 to 47, inclusive: It is submitted there is no evidence against this defendant, nor any responsibility on his part in relation to the matters set forth in these counts. The evidence offered by the prosecution is not sufficient to warrant a conviction of this defendant on said counts.

Count 51 charges the defendant in relation to the Mongolian Incident on the Khalkhin-gol River in the summer of 1939. Count 52 charges responsibility by ordering and causing and permitting the armed forces of Japan to attack the Union of the Soviet Social Republic, and unlawfully killing and murdering certain numbers of the armed forces of the Soviet Union. We submit that in the evidence offered by the prosecution in connection with this phase of the case there is no evidence of any kind or character which in any way connects the defendant with Counts 51 and 52.

Counts 53, 54 and 55 deal with conventional war crimes and crimes against humanity. We submit that the evidence offered by the prosecution is not

only insufficient to warrant a conviction of this defendant, but that there is not the slightest evidence in the record to charge any responsibility on the part of the defendant in connection therewith. The matters indicated in these counts are matters of military administration and in the very nature of things this defendant could not possibly have participated in them.

In referring to special counts in the Indictment, it is not intended in any manner to admit the charges against the accused in any of the counts to which no special reference is made. Where no special reference is made to particular counts, it is intended that the general statement in relation thereto shall be considered as a specific argument to each of said counts.

Without discussing in detail the nature of the evidence adduced, it seems to us that no responsibility can be placed on one who became the head of the Planning Board at a time when whatever action was to be taken by either the War or Navy Departments was already planned. Irrespective of the determination of the Court as to the various issues in this case, no responsibility can be placed in that respect on a subordinate board of a Department

of the Government.

This is dated this 8th day of January 1947.

MR. LEVIN: The following to be added to Memorandum in support of Motion of defendant SUZUKI, Teiichi, to Dismiss:

It will be noted from the date on the paper that this Motion and the KAYA Motion were filed on January 8, 1947, and I believe were in the possession of the prosecution shortly thereafter. I feel it my duty to direct the attention of the Tribunal to some additional facts in connection therewith.

It is a simple matter to blandly say there is no evidence to sustain a finding against the accused, but I desire to point out to the Tribunal that there is not a modicum of proof in this record as against this accused to show this defendant is guilty of any of the charges set forth in the various counts of the Indictment. We emphasize the absence of proof.

I think it is fair to say that General SUZUKI was interrogated by the prosecution on numerous occasions, which interrogations covered many pages of testimony, yet not one word of these interrogations was offered by the prosecution to sustain the charges against the defendant.

I pass over his career until 1941, not because I do not want to meet any issue there, but because the

evidence adduced in relation to him up to that time simply indicates that his activities were the customary and usual ones of a man who devoted his life to military service and such additional civil assignments as are frequently given to able military men by their governments. Since the preparation of the original motion, evidence has been introduced that in 1931 the 10-year plan was evolved, and in 1937 -- the typing there is 1931, but 1937 is correct -- the 5-year plan of total warfare, exhibit No. 841, was created. Whether these plans were for defense or offense is not a subject of argument now, but these plans were the genesis of future conduct by the government of Japan, and developed into fruition long before General SUZUKI became a member of the Cabinet and President of the Planning Board in April, 1941.

Throughout the record, however, we see evidence which indicates the position of this accused as being opposed to factions who it is claimed are responsible for the acts charged in the Indictment. In an early part of KIDO's Diary he writes that SUZUKI counsels against certain actions which might lead to war. There is no evidence in the record which shows that SUZUKI favored the Tri-Partite Pact, and I

am not now at liberty to discuss his attitude thereto because it is not in the record. If the prosecution had such evidence, there is no doubt that it would have been tendered.

The Germans said he was one of the moderates when his name was suggested for a decoration, which ultimately they must have decided not to give, because there is no evidence in the record that it was ever awarded, and in exhibit 2247 introduced subsequent to our original motion, where such awards were given to certain of the Japanese, SUZUKI received no such award.

The accused became Minister without Portfolio in the Third KONOYE Cabinet, and became President of the Planning Board in April, 1941. The typing is 1944. The correct date is 1941. All the laws referred to in exhibit No. 840, Mr. Liebert's statement, in relation to the preparation, to the acceleration, of Japanese economy and industry for war had already been passed when he assumed those offices. The mere assumption of office and the performance of duties in carrying on that office, in carrying out the functions of a department of the government, without evidence of creating policies and of activities by the individual outside and beyond these functions does

not constitute evidence sufficient to warrant a conviction.

As I have heretofore called the attention of the Tribunal to the fact that there is no evidence in the Indictment on Counts 53 to 55 -- here it is 52 to 55 -- inclusive, I shall not repeat what I said with respect thereto, but call the Tribunal's attention to my statement in the record at pages 15,558 to 15,560.

This we respectfully submit for the consideration of the Tribunal.

THE PRESIDENT: Major Blakeney.

MR. BLAKENEY: I present the motion to dismiss of TOGO, Shigenori.

NOW COMES the defendant TOGO, Shigenori and moves the Tribunal to dismiss the Indictment and the several counts thereof in so far as they relate to him upon the ground that the evidence adduced by the prosecution is insufficient to warrant a conviction upon any of the counts charged by the Indictment.

In support of the motion of TOGO, Shigenori, to dismiss the Indictment I wish to direct the attention of the Tribunal to, and briefly to analyze, the evidence as it bears upon this defendant. For

the convenience of the Tribunal, I shall summarize the evidence under a few general points or heads, indicating the specific counts of the Indictment involved in each of such points. (Although reference is made to the page of the record for each citation of evidence, in the interests of clarity I omit them in reading.)

Japanese-Russian Relations

The counts of the Indictment charging this defendant in connection with offences alleged against the U. S. S. R. are:

Count 17, charging the planning and preparing of war of aggression against the U. S. S. R. between the years 1928 and 1945;

Counts 25 and 35, charging respectively the initiating and the waging of war of aggression against the U. S. S. R. in connection with the Lake Khasan incident;

Counts 26 and 36, charging respectively the initiation and the waging of war of aggression against the U. S. S. R. in connection with the Khalkin-gol or Nomonhan incident;

Count 51, charging murder by ordering, causing and permitting attack on the territories of Mongolia and the U. S. S. R. in connection with

the Khalkin-gol or Nomonhan incident.

It is quite noteworthy that despite inclusion of his name in these counts (and despite his long connection with Russian affairs), no pretense was made in the Russian phase of the case of attempting to connect the defendant TOGO by evidence with any of these alleged crimes. His name does not appear in the opening statement of this phase. Only twice during the presentation of the evidence of the phase was the name of TOGO referred to (and both of those references were purely incidental); one other piece of evidence relates to the Foreign Ministry during his incumbency. These three references in the Russian phase were in exhibits 767, 678, and 683. The first is the agreement between the Japanese and Soviet governments, executed on the 9th of June 1940 by Molotov and TOGO, providing for demarkation of the frontier between the Mongolian Peoples Republic and Manchoukuo. This agreement recites that it is the result of negotiations carried on between Molotov and TOGO, and that TOGO had stated that the government of Manchoukuo consented to it. There is nothing of any nature in the document suggesting any further connection of the defendant TOGO with the Nomonhan (Khalkin-gol) incident, and patently

it has no tendency to prove the commission of any crime, participation in any conspiracy, or indeed anything except that a frontier was agreed upon--and thus to show TOGO in the aspect not at all of a warmonger, but rather of a peace-maker.

The other references to TOGO in the Russian phase were in connection with the National Policy Research Association (Kokusaku Kenkyukai), exhibit 678 and 683. Exhibit 683 is an extract from the membership list of that association, which includes among those claimed as members "TOGO Shigenori, Member of the House of Peers". Before discussing the character of the association, it might be well to point out that at the time Mr. TOGO held no office in the government, as is evidenced by his description as a member of the House of Peers, a position which he assumed only upon quitting the government; see the Cabinet Secretariat personnel record of TOGO, exhibit 127. Beyond the simple, unvarnished statement of TOGO's membership in the association, there is nothing to connect him with its activities, nefarious or otherwise.

However, reference to exhibit 678, the affidavit of YATSUGI, Kazuo, and his cross-examination upon it will effectually dispose of the National Policy

Research Association as a sinister organization. The association was a "private organization", composed of "non-official civilian members" who "had no responsibility to the association except payment of their established membership fees". It is true that funds were solicited -- and received -- from the Foreign Ministry among other sources, governmental and otherwise, even during the time that Mr. TOGO was Foreign Minister. But the witness' statement of the explanation which accompanied the request for funds leaves it very doubtful whether the Foreign Ministry -- or any contributor -- understood what it was spending its money for: that the Association "in pursuing a study of Greater East Asiatic problems" requested support by donation from "both private and official sources". Not only is there a complete failure of proof of any knowledge by the Foreign Minister of the activities of the Association, but there is nothing except the Association's rather ludicrous "research documents" to prove any criminality. The Tribunal will readily recall the impression which the testimony of this witness produced, and will, I think, agree that the National Policy Research Association emerged in the end as a thing far more ridiculous than sinister.

It is submitted that there is no substantial evidence to connect the defendant with the counts above mentioned in this phase.

THE PRESIDENT: I suggest this is a convenient break, Major Blakeney. We will adjourn until half-past nine tomorrow morning.

(Whereupon, at 1555, an adjournment was taken until Wednesday, 29 January 1947, at 0930.)

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It is submitted that there is no substantial evidence to connect the defendant with the counts above mentioned in this phase.

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